there, he attacked me around my neck and dragged me in the alley with his hand over my mouth when I started to scream. He had me flat on my back, trying to get between my legs with his knees.

Q. What was he doing to you?

A. Trying to rape me.

[4] Q. And did you know Mr. McNeil before this time?

A. No, sir.

Q. Had you seen him on any other occasion?

A. No, sir.

Q. Were you injured in any way as a result of this?

A. Yes, I was out of work for a week on account of my throat. I was unable to swallow.

Q. I see.

A. If it weren't for my husband heard me screaming and the officer was coming in the next alley, he would have choked me to death.

Q. You know the name of the officer?

A. No, I do not, but I can recognize him.

MR. SAPERO: All right. Witness with you.

CROSS-EXAMINATION BY MR. FEDERICO:

Q. Let's see here. Mrs. Berry, is that right?

A. That's right.

Q. You were walking home; is that what it was?

A. I was standing in front of my door.

Q. I see. What were you doing standing in front of your door?

[5] A. Trying to get in the house.

Q. Where were you coming from?

A. From my husband's nephew's house.

Q. I see. What were you doing there? Trying to get in the house?

A. Yes, knocking at the door.

Q. Oh, I see.

THE COURT: What is your address again?

A. 103 East 23rd Street.

Q. (By Mr. Federico) Was this in the evening?

A. No, it was in the morning.

THE COURT: What time of the morning?

A. I don't exactly know what time, Judge.

THE COURT: Was it daylight?

A. No, it was in the morning.

THE COURT: You mean like 6:00 o'clock?

A. No.

THE COURT: 9:00 o'clock?

A. After 2:00.

THE COURT: 2:00 o'clock in the morning?

A. I don't know exactly what time.

[6] Q. (By Mr. Federico) 2:00 o'clock in the morning? Is that what you said?

A. I guess it was after 2:00. Exactly, I don't know what time it was.

Q. After 2:00 in the morning and it wasn't dark out at all?

A. It was dark. I said morning.

Q. And you were knocking at the door going home?

A. Downstairs knocking at the door on the street.

Q. And you said Mr. McNeil approached you?

A. Yes, he did.

Q. Where was he coming from?

A. I don't know. He was coming across Calvert Street. I saw the man coming across the street. I thought he was going around his business, and then he grabbed me, dragged me in the alley, put his hand over my mouth.

Q. Grabbed you for no reason?

A. He was out in the street.

Q. He was on the street?

A. I was standing in front of the door.

Q. Did he run up to your door?

[7] A. No, he come across the street.

Q. Did he walk up to you?

A. I saw the man coming. I didn't know he was going to try to attack me. Then he dragged me in the alley, asked was I married, where my husband was at.

Q. Did you say anything to him?

A. No, I did not.

Q. He spoke to you first?

A. He said that.

Q. You didn't say anything to him about money?

A. No, I did not. I had money in my pocket. He didn't try to take my pocketbook.

Q. You didn't ask him for any money?

A. No, I did not.

Q. I see. And he just grabbed you for no reason at all?

A. Grabbed me around the neck, asked where my husband was. I said upstairs.

THE COURT: Was your husband upstairs?

A. Yes, sir. If it wasn't for my husband heard me screaming and the officer coming through the alley, he would [8] have choked me to death.

Q. (By Mr. Federico) Did Mr. McNeil say anything to you?

A. No, he just grabbed me around the neck. He had me flat on the back in the alley, with his hand on my mouth and throat, trying to get between my legs with his knees.

Q. Did he say he was going to rape you?

A. No.

Q. Did he say he was going to go to bed with you?

A. No, he did not.

Q. Did he ask if he could go to bed with you?

A. No.

Q. Any other people around?

A. No, sir.

Q. You live where?

A. 103 East 23rd Street.

Q. East 23rd Street?

A. Where I live is the alley right here (indicating).

Q. Is it dark there or light?

A. There's a light over the—you know.

Q. I see. And he dragged you around the corner?

[9] A. The alley is right here; I live here (indicating).

Q. How many feet would you say you are from the alley?

A. I don't know.

Q. Just some kind of estimate. Did he take you pretty far or a pretty short distance?

A. It was a pretty short distance.

Q. Did he carry you or just drag you?

A. Dragged me, his arm like this (indicating).

Q. Then you say he threw you on the ground?

A. Yes, right on my back and tried to get between my legs with his knees.

Q. And did he open your legs?

A. Tried his best to.

Q. Was your skirt down or up?

A. I had a dress and coat on. My coat is here now for evidence.

Q. Any of your clothes torn?

A. No, they were not.

Q. I see. And then you just yelled and screamed?

A. I screamed, trying to call my husband, and as I [10] started screaming he put his hand over my mouth.

Q. And you didn't say anything to him about money?

A. I had money; I work.

Q. I see. Have you ever been convicted of a crime?

A. No, I haven't.

Q. Never have?

A. No, sir.

MR. FEDERICO: I see. I have no further questions, your Honor.

THE COURT: Do you live in a house which is right next to the alley?

A. Yes, I do.

THE COURT: No other house in between your house and the alley?

A. No, because where I live is the laundramat right next door. The house is upstairs. It's between two alleys.

THE COURT: Your front door, are you right next to the alley?

A. Yes, on the side of the alley.

THE COURT: Did this man do anything to your clothing? [11] A. No, he did not.

THE COURT: Didn't try to pull your skirt up?

A. I had a dress on. He tried to open my legs with his knees; tried to press them open.

THE COURT: But your clothing was not up around your hips, just down around your knees?

A. That's right.

THE COURT: And you say you had been at some relatives of your husband?

A. 22nd and Calvert.

THE COURT: What were you doing there until 2:00 o'clock.

A. My husband just left. He asked was I ready to come

home and I told him no. He said when you get ready come home. He was upstairs watching television.

THE COURT: He left his relatives how long before you did?

A. Oh, about ten or fifteen minutes. He wasn't gone that long. When I got upstairs, he still had his clothes on. He hadn't gone to bed.

[12] THE COURT: When you got upstairs?

A. You know, when everything was over with; when the officer came in.

THE COURT: You say you made some noise and the officer came?

A. I was screaming and an officer heard me.

THE COURT: Where was McNeil when the officer got there?

A. Running in the next alley, right into the hands of the officer.

THE COURT: I see. And your husband didn't come downstairs.

A. He came down. You know, the officer was there at the time he came downstairs.

THE COURT: Well, I thought you said you went upstairs.

A. I mean when the officer arrested him he came down. I mean, I went downstairs. The officer requested me to identify him. He had his hands over his face, and he said, "Miss, please tell him I'm not the one."

THE COURT: My question is this. While [13] this screaming was going on, did your husband come down from your apartment?

A. He looked out the window. He said O.K. That's when he came downstairs.

THE COURT: Said O.K.?

A. Came downstairs and he got up and ran in the next alley.

THE COURT: All right.

MR. SAPERO: I have a few further questions.

RE-DIRECT EXAMINATION BY MR. SAPERO:

Q. Did you see Mr. McNeil run away?

A. Yes, he got up and ran.

Q. What made him leave?

A. By me screaming.

Q. Then he got up and started running?
A. Yes.
Q. Did you see the police arrive at that time?
A. Yes, I saw the officers.
Q. And did you see the police catch Mr. McNeil?
A. No, I did not.
Q. I see. Now, after the police did apprehend Mr. [14] McNeil and bring him back, did you observe Mr. McNeil do anything to the police officers?
A. I do not know.

MR. SAPERO: All right. I have no further questions.
THE COURT: You may step down.
MR. SAPERO: May we approach the bench, your Honor?

(OFF RECORD BENCH CONFERENCE)

MR. SAPERO: Mr. Moore, take the stand, please.

JACK MOORE,

a witness produced on call of the State, having first been duly sworn, according to law, was examined and testified as follows:

BAILIFF: State your name and address into the microphone.

A. Jack Moore, 2640 North Charles.

DIRECT EXAMINATION BY MR. SAPERO:

Q. Mr. Moore, I direct your attention to May 1st, 1966, in the early morning hours, around 2:20 A.M. approxi- [15] mately, in the vicinity of 103 East 23rd Street and also, further, in the vicinity of the 2200 block of Hargrove Street. Were you in that vicinity at that time?
A. No, sir, I was not.
Q. Did you have occasion to observe Edward Lee McNeil, the Defendant——

MR. FEDERICO: Objection, your Honor.
MR. SAPERO: Let me finish. Then you can object.
THE COURT: Finish the question.

Q. (By Mr. Sapero) Did you have occasion to observe

Edward Lee McNeil, the Defendant in this case today, struggling with a police officer on that day?

A. On that date, yes, sir.

Q. Where was that?

A. At the corner of 21st and Calvert.

Q. 21st and Calvert? And what did you do?

A. I was driving north on Calvert. I noticed two persons struggling. I observed one was an officer. I pulled the car to the side of the street, went over and assisted the officer as best I could.

[16] Q. Do you know who that officer was?

A. Yes, sir. Officer Jerome Johnson, Northern District.

Q. What happened when you went over? Is that Officer Jerome Johnson of the Northern District?

A. That's correct.

Q. Did you go over and render aid to the officer?

A. As much as I could, yes. He was trying to subdue the person.

Q. What did you do?

A. I tried to stop the Defendant from struggling with the officer; tried to hold him.

Q. And what happened during this time?

A. Well, as near as I can remember, I tried to hold the Defendant's left arm. The officer was using his night stick, and the Defendant was pushed to the ground.

Q. I see. And was Mr. McNeil finally subdued?

A. Yes, sir.

Q. And would you indicate to the Court the person who you helped Officer Jerome Johnson apprehend at that time?

A. This gentleman here (indicating).

[17] Q. Indicating the Defendant, Edward Lee McNeil. During the struggle, did you observe Mr. McNeil in any way strike Officer Johnson?

A. He was attempting to, yes, sir.

Q. Did he on any occasion actually strike Officer Johnson?

A. I couldn't say, sir. I was trying to keep from getting struck myself.

Q. I see. Well, then he was flailing his arms or something to that effect?

A. That's right.

Q. Were there any noticeable physical appearances of

the officer which indicated that he had been struck by Mr. McNeil?

A. To my observation, no.

Q. That is, was he bleeding or cut or anything?

A. I didn't see any, no, sir.

MR. SAPERO: All right. Witness with you.

CROSS-EXAMINATION BY MR. FEDERICO:

Q. Mr. Moore, you were driving up where, Calvert Street?

A. Calvert, yes, sir.

[18] Q. At 2:00 o'clock in the morning?

A. Yes, sir.

Q. What were you doing up at 2:00 o'clock in the morning?

MR. SAPERO: Objection.

THE COURT: Overruled.

A. That was a Saturday night, I was down on Charles Street over at a local bar.

Q. (By Mr. Federico) Local bar? Had you had anything to drink that night?

A. I think three beers.

Q. Three beers? Were you by yourself?

A. Yes, sir.

Q. Were you in that bar all that evening?

A. No, sir.

Q. Were you in any other bar that evening?

A. No, sir.

Q. So you were driving what—north on Calvert Street?

A. That's right.

Q. And you saw this officer standing on the corner?

A. No, sir. I saw the struggle between two persons [19] first.

Q. You saw a struggle between two persons. At that time, did you know who they were?

A. No, sir. I observed one was an officer. I had stopped at the light and turned around and saw the struggle and as I looked closer I saw one was an officer.

Q. Then you got out of the car?

A. No, sir, I pulled through the light, pulled over on the side of the street and then went back.

Q. At any time, did you see the Defendant here, Mr. McNeil, strike the officer?

A. If he didn't hit him, he was trying awfully hard.

Q. I don't care what he was trying to do. My question is did you see Mr. McNeil hit the officer?

A. No, sir.

Q. So, in other words, you just saw two people over there on the corner, is that right?

A. That's correct.

Q. And to you it looked like they were having an argument, is that right?

A. Yes, sir.

[20] Q. I see. And at no time did you ever see anyone hit the officer, is that right?

A. Yes, sir.

Q. All right. Would you say you had all your faculties about you at the time?

A. Yes, sir.

Q. Would you say you had gotten over the after effects of the three beers you had?

A. I would say so, yes, sir.

Q. In other words, you would classify yourself as being sober at the time?

A. That's right.

Q. I see. Now, have you ever been convicted of a crime?

A. No, sir.

MR. FEDERICO: I have no further questions.

MR. SAPERO: I have a further question.

RE-DIRECT EXAMINATION BY MR. SAPERO:

Q. Mr. Moore, did you hear Mr. McNeil say anything in your presence to the police officer?

A. After Mr. McNeil was subdued, he kept crying and [21] repeating, "No, Lord, no; not again."

Q. Is that all?

A. "I didn't hurt that woman." He said, "I did not hurt that woman."

Q. He said, "I did not hurt that woman"?

A. Yes, sir.

MR. SAPERO: I see. All right, no further questions.

THE COURT: After you had assisted the officer and the Defendant, McNeil, was subdued, did you leave?

A. No, sir, I stayed until I was dismissed.

THE COURT: Well, as I understand it, McNeil was taken to this girl's house. Did you go along on that trip?

A. No, sir, I did not.

THE COURT: All right, thank you.

MR. SAPERO: Thank you very much, Mr. Moore. Officer Jerome Johnson.

(No response.)

MR. SAPERO: If the Court pleases, the State [22] would offer the testimony of Officer Jerome Johnson. He has been summoned and is not in the court room at this time, and we would request a continuance in order to have Officer Johnson present to testify, if necessary.

THE COURT: Well, that's the question—if necessary. I think perhaps the State has made out a sufficient case at this point, and if it becomes necessary to call the officer in rebuttal, you may have leave to do so.

MR. SAPERO: Very well. Then the State would rest its case in chief.

MR. FEDERICO: At this time, your Honor, I would like to make a motion for judgment of acquittal as to each and every indictment. As to the assaults on the two officers, your Honor, at this stage I don't see—

THE COURT: Well, in reference to indictment 2394 the motion is granted and the verdict is not guilty. In the other two indictments, 2392 and 2393, the motion is denied.

MR. FEDERICO: Yes, your Honor. Mr. McNeil, take the stand, please.

[23] EDWARD LEE MCNEIL,

the Defendant, having first been duly sworn, according to law, was examined and testified as follows:

BAILIFF: State your name and address into the microphone.

A. Edward McNeil, 319 East Lanvale Street.

DIRECT EXAMINATION BY MR. FEDERICO:

Q. How old are you, Mr. McNeil?

A. Nineteen.

Q. Now, how far did you go in school?

A. I graduated last year.

Q. Where did you graduate from?

A. Carver High.
Q. Carver High?
A. Yes, sir.
Q. Have you been in the Army?
A. No, sir. I was supposed to leave this year.
Q. Are you still supposed to leave?
A. Well, this I couldn't say.
Q. You couldn't say? Have you been inducted?
A. Yes, I have been inducted, yes, sir.
[24] Q. Now, are you working presently?
A. No, sir.
Q. Had you been working up to this occurrence?
A. Yes, sir.
Q. Where were you working?
A. I was working at Regal Empire Laundry.
Q. Are you married?
A. No, sir.
Q. Do you have any children?
A. No, sir.
Q. You live with your family?
A. Yes, sir.
Q. How many in your family? You have a mother and father?
A. Yes, sir.
Q. Both of them living?
A. Yes, sir.
Q. Living together?
A. Yes, sir.
Q. Have any brothers or sisters?
A. I have four brothers and three sisters.
[25] Q. I see. Do you contribute to the support of your family?
A. Yes, sir.
Q. Now directing your attention to the first day of May, you heard this lady take the stand and testify that you were walking up the street or across the street and you came up to her and you said something to her. Is this true?
A. No, sir.
Q. Tell the Court exactly what occurred. Had you ever seen this woman on this night she was talking about?
A. Yeah, I seen her after the police had grabbed me and apprehended me; after they beat me up.

Q. They beat you up?
A. Yes, sir.
Q. How did they beat you up?
A. They beat me up all in my head.
Q. Did they grab you?
A. Yes, sir.
Q. Where did they grab you?
A. First time they grabbed me was on 21st Street on my way home from a party. They started asking me a lot of [26] questions and I guess I wasn't answering them right, I guess, and the man told me that I was a smart guy and he told me to put my hands on the car and he started searching me and came out of my pocket with my money. He asked where I got it from. I told him it was none of his business. He told me he was sick of me being smart with him; told me get in the car. I told him I wasn't getting in because I didn't do nothing.
Q. When the two officers approached you, did they tell you why they wanted to talk to you?
A. No, sir.
Q. Were you running at the time?
A. No, sir.
Q. Were you walking fast?
A. No, sir.
Q. You testified you were coming from a party?
A. Yes, sir.
Q. Where was that party?
A. 21st Street.
Q. And how long were you at the party?
A. I was at the party about three hours or three [27] ~~and a~~ half.
Q. Had you had anything to drink at the party?
A. No, sir.
Q. Do you drink?
A. No, sir.
Q. I see. And where were you walking?
A. I was walking on 21st Street, getting ready to go down to St. Paul Street going home.
Q. Had you had a date with you that night?
A. A date? Oh, it was some girls at the party, but it wasn't necessarily a date.
Q. I see. Now, you heard this woman testify you came

up to her when she was trying to get in her house, didn't you?

A. That's what she said.

Q. And you grabbed her around the neck. You heard her testify as to that?

A. Yes, sir.

Q. You heard her testify you dragged her around the side of the house and into an alley?

A. Yes, sir.

[28] Q. And you jumped on top of her?

A. Yes, sir.

Q. Now, is this true or not true?

A. Not true.

Q. So now the first time you claim you have seen this woman was when the officers picked you up and took you back to her house?

A. They never took me to her house. They had me on 22nd Street. They had me on the ground and beat me up, and they had me in a cruiser. They never took me to her house.

Q. I see. Did they have you standing on the corner?

A. Had me on the cruiser.

Q. Did you ever hit any of these officers?

A. No, sir.

Q. Would you ever hit an officer?

A. No, sir, I respect officers.

Q. You respect the law?

A. Not these two.

Q. Well, now, you heard this man testify, Mr. Moore, that he came up. Did you ever see Mr. Moore?

A. I saw him when he came up.

[29] Q. What did he do?

A. Well, when he came up, I asked him to help me. I thought the officer on top of me was crazy. He was hitting me in the head. I didn't know what for. I was crying and bleeding. He didn't pay any attention. The officer told him to call the patrol wagon and I guess he went across the street and called the wagon.

Q. Did Mr. Moore touch you?

A. No, sir.

Q. I see. Now, have you ever been convicted of a crime before?

A. No, sir.
Q. Never have been?
A. No, sir.
Q. You sure of that? Have you ever gotten any time?
A. No, sir.
Q. Never got a suspended sentence or anything?
A. Probation before a verdict on a charge before.
Q. What charge was that?
A. It was assault and robbery—attempted rape. I mean, assault and rape and assault and robbery.
[30] Q. Probation without verdict?
A. Yes, sir.
Q. Is there anything else you would like to tell the Judge about this?
A. I would like to say they beat me up for no reason at all. I got sixteen or eighteen stitches in my head.
Q. Where in your head?
A. Right up here in the top of my head and over here, (indicating). You can see the scars.
Q. Are you in jail now? Have you been in jail?
A. Yes, sir, I been there all this time.
Q. You like it over there?
A. No, sir.
Q. Now, this man over here is going to ask you some questions. You sit there and answer him, you hear?
A. Yes, sir.

MR. FEDERICO: O.K.

CROSS-EXAMINATION BY MR. SAPERO:

Q. Now, Mr. McNeil, how far away is the place where you were apprehended by the police from 103 East 23rd Street?
A. I don't know. I don't know where 103 East 23rd
[31] Street is.
Q. You know where 23rd Street is?
A. Yes, sir.
Q. You know where the 100 block of 23rd is?
A. Not right off.
Q. Have you ever been on 23rd Street?
A. Not that way. Going up towards Greenmount Avenue, I been across to the Recreation Center.
Q. Where was that party you had been to?

A. 21st Street.

Q. Where?

A. 21st Street.

Q. On 21st Street?

A. Yes, sir.

Q. What hundred block?

A. It was below St. Paul Street.

Q. You know what hundred block it was?

A. No, sir. I didn't pay any attention to the house number.

Q. And where did you live?

A. 319 East Lanvale Street.

[32] Q. How far away is that from 23rd Street?

A. I'll say about a good six or seven blocks.

Q. Six or seven blocks. And you were on your way home?

A. Yes, sir.

Q. Now, when the police observed you, what were you doing?

A. I was walking up 21st Street getting ready to go down St. Paul Street.

Q. Had you been walking in any alleys that night?

A. No, sir.

Q. Now, when the police put you under arrest, why didn't you go with the police officer?

A. Because I hadn't done anything.

Q. And what did you then do? Try to break away?

A. No, I didn't try to break away. I stood there. Only time I was broke away was when the officer hit me in the back of the head with a night stick. I got scared and ran.

Q. Were you standing there and the officer hit you?

A. No, he was questioning me first, the one standing [33] in front of me, and the one behind me, after he grabbed me and tried to force me in the patrol car, I jerked away from him. I fell back on him. He pushed me up and took his stick out and hit me in the head. That's when I broke and ran.

Q. When did Mr. Jack Moore get to the place where you were apprehended? How long after the police officer stopped you?

A. Ten or fifteen minutes. No, about five or ten minutes.

Q. Five or ten minutes?

A. Yes, sir.

Q. Well, did the officer strike you just before Mr. Moore came up or immediately after stopping you?

A. He was—immediately after stopping me?

Q. When he first stopped you, he didn't walk up and strike you, did he?

A. No, sir.

Q. He started asking you questions, is that right?

A. Yes, sir.

Q. And when was it that he struck you? After Mr. Moore got to the scene where you were?

[34] A. No, he struck me before Mr. Moore was anywhere around.

Q. Then you started running away?

A. Yes, sir.

Q. Did he strike you at that time from the front or the back, the first time that you say he struck you?

A. From the back.

Q. He struck you from the back?

A. Yes, sir.

Q. Was he holding you in any way?

A. He wasn't holding me. He pushed me.

Q. I can't hear you.

A. I fell back on him and he pushed me up and then hit me.

Q. Then what did you do?

A. I ran.

Q. He didn't have his hand around your belt?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Now, are you presently on probation?

[35] A. No, sir.

Q. You are not on probation?

A. No, sir. I was given probation before verdict, but it wasn't any—

Q. How long ago was that?

A. About two or three months.

Q. Was that uptown here?

A. Yes, sir.

Q. Who was the Judge?

A. Judge Byrnes.

Q. Was that on those various charges that you just told us about?

Q. Assault and robbery?

A. Yes, sir.

Q. And rape?

A. Yes, sir.

Q. Was anyone else involved in that particular case?

A. Was anyone else?

Q. Yes.

A. You mean did I have another co-defendant? Yes, sir.

[36] Q. How many others? Just one?

A. Yes, sir.

Q. Now, did you say, in the presence of Mr. Jack Moore, who testified today, when he was present after the police officer had apprehended you that "I didn't hurt her; I didn't hurt her"?

A. No, sir.

Q. Then, did you say that, "I didn't hurt the woman", or something like that?

A. No, sir.

Q. You said that at no time in his presence, is that right?

A. I didn't say it at all.

Q. You didn't say that at all?

A. No, sir.

Q. Then you would contend that Mr. Moore is lying, is that correct?

A. He has to be.

Q. Now, did you make any attempt to grab the police officer's revolver when you were in the struggle?

A. No, sir. The only thing I was trying to do was [37] get away from him because he was beating in my head like he was crazy.

Q. Do you recall striking Mr. Moore?

A. I didn't strike anybody at any time.

Q. Even when he was trying to subdue you?

A. He didn't put his hands on me.

MR. SAPERO: I have no further questions.

RE-DIRECT EXAMINATION BY MR. FEDERICO:

Q. Let me ask you this. Were you excited when all this was going on?

A. I was fighting; I was scared.

Q. You could have said anything at that time, couldn't you?

A. Probably so. He was beating me in the head. I probably was delirious after being beat in the head.

Q. You testified that you don't recall saying any thing about this woman?

A. No, not at any time.

Q. Would you have remembered if you did?

A. Yes, sir, now I would remember. I remember everything that happened that night.

[38] MR. FEDERICO: That's all.

THE COURT: Well now, you say you remember everything that happened that night? You were at a party on 21st Street?

A. Yes, sir.

THE COURT: Whose house was it?

A. It was a girl's house. I don't know her name.

THE COURT: Where was the house?

A. It was below St. Paul Street.

THE COURT: What do you mean by below St. Paul Street?

A. When I left the house—I don't know the address of the house, but I was coming towards St. Paul Street.

THE COURT: You know where Calvert Street is?

A. Yes, sir.

THE COURT: You know where Charles Street is?

A. Yes, sir.

THE COURT: You know where St. Paul is?

A. Yes, sir.

[39] THE COURT: Was this house between Charles and St. Paul?

A. Yes, sir.

THE COURT: Between Charles and St. Paul?

A. Yes, sir.

THE COURT: You sure?

A. I think so.

THE COURT: All right. When you came out of the house, which way did you go?

A. I was walking on 21st Street.

THE COURT: In which direction?

A. I was walking east on 21st Street.

THE COURT: Did you cross St. Paul Street?

A. No, I was about to go down St. Paul Street.

THE COURT: You were still between Charles and St. Paul when the police first approached you?

A. No, I was on St. Paul Street ready to go down. I was on the corner of 21st and St. Paul about to go down St. Paul Street.

THE COURT: And that's where the police first came in touch with you?

[40] A. Yes, sir.

THE COURT: Well then, later on did you wind up at 21st and Calvert?

A. I wound up on 22nd and Calvert.

THE COURT: After the police had you in the radio car, did you say they drove you around to some house?

A. They never drove me to any house. They had me on 22nd Street in a cruising patrol that came and they put me in the cruiser.

THE COURT: Then where?

A. I went to the hospital to get my head sewed up.

THE COURT: Then where?

A. To the station house.

THE COURT: Did you ever see this lady, this Ruby Mae Berry, that testified here?

A. I saw her at the station house.

THE COURT: Same night?

A. No, sir.

THE COURT: How much later?

A. That Sunday.

[41] THE COURT: What day of the week was it you got arrested?

A. I got arrested on Saturday.

THE COURT: Saturday night or Sunday morning?

A. Yes, sir.

THE COURT: And you saw her at the police station what time of day on Sunday?

A. I think it was 3:00 o'clock.

THE COURT: And your testimony is that is the first time you ever saw the lady?

A. Yes, sir.

THE COURT: Never saw her on the street on 23rd Street?

A. No, sir.

THE COURT: Never saw her anywhere near Calvert Street?

A. No, sir.

THE COURT: All right, that's all.

MR. FEDERICO: Step down, Mr. McNeil. At this time, your Honor, I would like to renew my motions.

[42] THE COURT: Is that the Defendant's case? I'd like to recall Mrs. Berry for a few minutes.

MR. SAPERO: Mrs. Berry.

RUBY MAE BERRY,

having been previously sworn, resumed the stand and further testified as follows:

BAILIFF: Just state your name.

A. Ruby Mae Berry, 103 East 23rd Street.

THE COURT: Now, this address at which you live is near what street, what cross street?

A. Calvert Street.

THE COURT: Near Calvert Street?

A. Between Calvert and St. Paul, but it's more towards Calvert.

THE COURT: Now, when you were coming to your home, what street did you walk on?

A. I didn't come down the street. I came through the little alley. You know, it's two alleys by my house. I came through the alley.

THE COURT: Were you coming south, from [43] like 24th?

A. I was coming straight down 22nd Street—yeah, 22nd Street.

THE COURT: You crossed 22nd Street?

A. Yes.

THE COURT: From what other street? Where did you get on 22nd Street?

A. The houses are on 22nd Street near Calvert. I came—

THE COURT: What house?

A. The One—

THE COURT: The house you were visiting?

A. Yeah, and my husband was there too.

THE COURT: You came down an alley behind—

A. I came straight across Calvert—I mean 22nd, and the first—second alley and came towards my house.

THE COURT: So you came through an alley from 22nd to 23rd?

A. 22nd Street, it's—I mean, it's light there. It was no one following me.

THE COURT: But your house is on 23rd?

[44] A. Yeah, but I came—the way the street is, I came straight down 22nd Street and through the side street, an alley there. My house is here—that's 23rd (indicating).

THE COURT: So you went through an alley from 22nd Street to 23rd Street.

A. Yeah, uh huh.

THE COURT: To get to your house. Now then, you told us about this person grabbing you.

A. Yes, in front of my door.

THE COURT: Is your house on the north side of 23rd Street or the south side?

A. I believe it's the south side. I don't know too much about it.

THE COURT: What's across the street from you?

A. What's across the street from me? Red Cross.

THE COURT: Red Cross. Now, you say that this man, after your husband looked out of the window, he started running?

A. He jumped from on top of me and run into the next alley.

[45] THE COURT: Which way was he running?

A. I guess—I think it was north.

THE COURT: You know where 22nd Street is?

A. Sure I do.

THE COURT: Do you know where 24th Street is?

A. Sure.

THE COURT: 24th Street is north of 23rd.

A. Yes.

THE COURT: And 22nd Street is south of 23rd. Now, when he ran, did he run toward 22nd Street or 24th Street?

A. 22nd.

THE COURT: And through an alley?

A. That's right.

THE COURT: And the alley is between what streets?

A. Between St. Paul and—St. Paul and 22nd. It runs right straight across 22nd Street; both alleys does.

THE COURT: Is it between St. Paul and Calvert or between St. Paul and Charles?

[46] A. St. Paul and Calvert. It's nowhere near Charles.

THE COURT: All right. Now, you say when the police—that sometime later after he ran away he came back to your house?

A. The police had him in the—you know, the cruiser. He was bleeding. He said, "Miss, please tell him I'm not the one."

THE COURT: What happened? They came to your house?

A. To identify him.

THE COURT: And you were upstairs?

A. I was downstairs at the door in front of my house with my husband.

THE COURT: What did you do?

A. He asked me to identify is that the one. I said, "Yes, Officer".

THE COURT: You went and looked in the car, I guess?

A. I looked in the car. He was standing up, you know. They opened the back door and asked me is that the one. I said yes, and he was bleeding, with his hand over his face.

[47] THE COURT: How are you sure it was the same one?

A. That's the same man, definitely. That's him. He had gray pants on. I got a good look at his face.

THE COURT: All right, that's all. Any questions, gentlemen?

MR. FEDERICO: No questions.

MR. SAPERO: No further questions.

THE COURT: All right, you may step down.

MR. FEDERICO: Your Honor, at this time, I would like to renew my motion for judgment of acquittal.

THE COURT: I think I'm going to grant the State the right they mentioned earlier to continue the case with reference to any other witnesses they may wish to produce tomorrow morning. Can you arrange it for tomorrow?

MR. SAPERO: Yes, your Honor.

THE COURT: The case will be continued tomorrow morning at 10:00 o'clock.

MR. FEDERICO: Yes, your Honor.

[48] July 13, 1966

PROCEEDINGS

THE CLERK: Edward Lee McNeil, Mr. Federico, Indictments 2392, 93 and 94. These cases are continued from yesterday. Have seats, please.

MR. SAPERO: Officer Johnson.

JEROME JOHNSON,

a witness produced on call of the State, having first been duly sworn, according to law, was examined and testified as follows:

BAILIFF: State your name and assignment, please sir.

A. Officer Jerome Johnson, Northern District.

DIRECT EXAMINATION BY MR. SAPERO:

Q. Officer Johnson, Edward Lee McNeil, the Defendant in this case, testified yesterday that when you were in pursuit of him with regard to an offense which took place at 103 East 23rd Street on May 1st, 1966, at about 2:20 A.M.—

MR. FEDERICO: Your Honor, I'm going to have to object to all this.

[49] THE COURT: The question is very leading. I'll have to sustain the objection.

MR. SAPERO: This is rebuttal. I'm trying to limit my question. I can give an overall question and have the witness answer.

THE COURT: I think we should just find out what the Officer's participation in the case was.

Q. (By Mr. Sapero) I direct your attention to May 1st, 1966, at about 2:20 A.M. at Hargrove and East 23rd Street. Tell the Court what, if anything, unusual took place there at that time.

A. Yes, sir. At about 2:21 A.M. on May 1st, working 502 car in company with Officer Richard Hax, we were cruising in the vicinity of 22nd and St. Paul. We heard some woman screaming for help, put the headlights out on the car and proceeded north on Hargrove Street when we observed a male running toward the car. We stopped the car as we

put the headlights on and stopped the Defendant, McNeil, here.

Q. Do you see him in the court room?

A. Right here (indicating).

Q. For the record, the witness indicates the Defendant, [50] Edward Lee McNeil, seated at trial table with defense counsel. What happened?

A. As Officer Hax got out and stopped the Defendant, McNeil, he was questioning him. At that time, McNeil shouted that he hadn't hurt anyone or didn't do anything to this woman. His clothes were disarranged, his trousers unzipped in the front. At the time, he struck Officer Hax, knocked him back against the radio car and continued to run south on Hargrove Alley. Officer Hax and I started in pursuit of him. Officer Hax returned to get the automobile and I chased the Defendant south on Hargrove to 22nd Street, when we cut over a half block into a smaller alley and through this alley to 21st and Calvert Street where the Defendant was tiring and fell in the middle of the street. As I approached him, I grabbed him by the shirt. At this time, he swung around, struck me in the face and in the chest and then the struggle began. Both of us were on the ground rolling around. At this time, my revolver became dislodged from the holster and was lying five or six feet from where the struggle was taking place. McNeil was crawling in the direction of the revolver. Both of us made an attempt to [51] get the revolver. At this time, I struck the Defendant several times with the night stick to apprehend him. I was able to regain the revolver, put it back in the holster and held him on the ground. A citizen came to my aid and helped me hold him on the ground—one Jack Moore, 2102 North Calvert Street—right on the corner. By this time, the citizen called assist an officer and the cruising patrol responded. The Defendant was on the way to Union Memorial Hospital when we received a call to return to 103 East 23rd Street, where the victim of this case positively identified him as the subject that assaulted her.

Q. You are referring to one Ruby Mae Berry?

A. That's correct.

MR. SAPERO: All right. Witness with you.

CROSS-EXAMINATION BY MR. FEDERICO:

Q. Officer, what are you reading there?

A. These are my notes.

Q. Your notes?

A. Yes, sir.

Q. Did you type those yourself?

A. Yes, sir.

[52] Q. Nobody else's notes?

A. No.

Q. I see. Now, did Mr. McNeil have a scuffle with you, you say, Officer?

A. That's correct.

Q. Did you get hurt in the scuffle?

A. Just abrasions of the knees.

Q. Did he seem like he was coherent at the time?

A. Well, he was very disturbed, I would say.

Q. When you approached him on the street, what did you say to him?

A. At what time?

Q. When you first saw him.

A. When he was first stopped?

Q. Yes, sir.

A. I didn't say anything to him. Officer Hax asked what he was running from, and he just continued to yell, "I didn't hurt the woman; I didn't hurt the woman." That's all he said. That's when he struck Officer Hax and ran south on Hargrove Street.

Q. In other words, he said this before you said any-[53] thing to him about anything?

A. That's correct. Just when he was stopped, that's when he began to yell this.

Q. Was he walking down the street?

A. He was running.

Q. Running down the street?

A. Yes.

Q. He was just yelling this out of a clear blue sky?

A. No, he yelled that as he was speaking to the officer.

Q. Oh, I see. Did he start a fight with you, would you say?

A. I would call it more than a fight.

Q. You would?

A. Yes, I would.

Q. Now, once you had him under control, you went back to Mrs. Berry's house, is that correct?

A. In front of her house, 103 East 23rd.
Q. Did you then take Mr. McNeil in to the—
A. Mr. McNeil went to Union Memorial Hospital.
Q. I see. And did he make any statement to you at all?
[54] A. No, he didn't make a statement.
Q. How are you feeling today?
A. Oh, I'm fine.
Q. In good shape?
A. Fine.

MR. FEDERICO: No further questions, your Honor.
MR. SAPERO: I have one further question.

RE-DIRECT EXAMINATION BY MR. SAPERO:

Q. Now, Officer, with regard to the address of 103 East 23rd Street, where the offense took place, what would you say would be the distance from there to where you first observed the Defendant, Edward Lee McNeil, and also the distance from there to the place where you subsequently apprehended him?

A. Well, it was about a hundred feet west on 23rd Street and then he was stopped about two hundred feet south on Hargrove. Then, after the chase, it was approximately two and a half blocks.

Q. So, initially, it was within a half block of 103 East 23rd Street?
[55] A. That's correct.
Q. And when you actually did subdue him, it was about two blocks away?
A. Right.

MR. SAPERO: No further questions.
THE COURT: Officer, you were cruising, as I understand it, on 22nd Street?
A. In the vicinity of 22nd and St. Paul, your Honor.
THE COURT: And you heard some screams?
A. Yes, sir, we heard a woman screaming very loudly.
THE COURT: Where did your automobile go after you heard the screams?
A. In the direction of the screaming, which was north on Hargrove toward 23rd.
THE COURT: You turned the automobile north on Hargrove?

A. That 's correct, off 22nd.

THE COURT: Toward 23rd?

A. Yes, sir.

THE COURT: And it is your testimony at that time you saw this young man coming south on Hargrove?

[56] A. Just about to the top of Hargrove Street, where we would come on to 23rd, we observed him turn the corner running very fast.

THE COURT: Did you follow him on foot?

A. No, sir, he ran right into the car. We had the headlights out. As he approached, we put the lights on and got out.

THE COURT: Then he was stopped and then he got away?

A. That 's correct.

THE COURT: In what direction did he go then? South on Hargrove?

A. South on Hargrove.

THE COURT: Were you chasing him on foot or the other officer?

A. I was, yes, sir.

THE COURT: I see. All right, that 's all.

MR. SAPERO: Thank you, Officer.

THE COURT: Oh, one other question. During the time you were chasing him, did you lose sight of [57] him at any time?

A. No, sir, at no time.

THE COURT: Thank you.

MR. SAPERO: That would be the State's case, if the Court pleases.

MR. FEDERICO: Your Honor, I would like to make a motion for judgment of acquittal for the record as to the two remaining indictments, 2393 and 2392. As to 2392 your Honor, I don't think there has been any evidence before the Court as to the first count of the indictment, the intent then and there feloniously to ravish and carnally know her forcibly and against her will.

THE COURT: The motion is denied in 2392 as to both counts and in 2393 as to the one count in the indictment. Any additional testimony you wish to offer?

MR. FEDERICO: None whatsoever, your Honor.

THE COURT: Do you wish to be heard on the verdict?

MR. FEDERICO: If it 's permissible, I would like to call the prosecuting witness back to the stand.

THE COURT: Very well.

[58] RUBY MAE BERRY,

having been previously sworn, resumed the stand and further testified as follows:

BAILIFF: Just be seated. You're still under oath. State your name for the record.

A. Ruby Mae Berry, 103 East 23rd Street.

RE-CROSS-EXAMINATION BY MR. FEDERICO:

Q. Mrs. Berry, you testified yesterday that Mr. McNeil approached you while you were going into the front of your house.

A. That's right.

Q. And he placed his hands around your neck or mouth and dragged you off into the alley.

A. That's right.

Q. Well, you also testified you screamed and your husband heard you?

A. Yes, sir.

Q. He looked out the window?

A. Yes.

Q. Well, how could anyone hear you if the Defendant had his hand across your mouth?

[59] A. I said he grabbed me around my neck. I started screaming. He put his hand over my mouth.

Q. I see. And did you still remain to scream?

A. Trying to scream, to call my husband, but he was still choking me.

Q. I see, but you didn't have any problem screaming?

A. Did I have any problem screaming? No, sir.

MR. FEDERICO: No further questions.

THE COURT: Mrs. Berry, during the time that this man was with you, did he use any language concerning any sexual activity?

A. No, sir.

THE COURT: Did you have an opportunity to observe whether or not his clothing was disarranged?

A. No, sir.

THE COURT: All right, that's all. You may step down.

MR. FEDERICO: I will submit, your Honor.

THE COURT: Well, I think the case is proven beyond any reasonable doubt with reference to the purpose of the

assault and also as to the identity of the [60] Defendant, so the verdict in 2392 is guilty generally and in 2393 is guilty. Now, there was some reference made yesterday to the fact that this boy is on probation, although I got no details about it. Is that true?

MR. SAPERO: If the Court pleases, may we approach the bench on that, your Honor?

(OFF RECORD BENCH CONFERENCE)

THE COURT: While the Court records do not reflect a conviction on any previous charge, I feel from what I know about this young man that a psychiatric report is indicated. The matter will be held sub curia and referred to the Medical Department for a psychiatric evaluation.

MR. FEDERICO: Thank you, your Honor.

---

[61] July 29, 1966

PROCEEDINGS

THE CLERK: Edward Lee McNeil, Mr. Federico.

THE COURT: Anything you wish to say before disposition?

MR. FEDERICO: Your Honor, as the Court will recall, Mr. McNeil is a young man, nineteen years of age. He didn't go too far in school. He was employed at the time this incident occurred and was contributing to the support of his family. He was, as the Court is well aware, found not guilty on one of the charges.

THE COURT: What was he found not guilty of?

MR. FEDERICO: Assault of one of the police officers, your Honor.

THE COURT: Well, we have him here on two cases—attempted rape and assault on a police officer.

MR. FEDERICO: Yes, your Honor. There were two assault on police officers.

THE COURT: This is Jerome Johnson, police officer.

[62] MR. FEDERICO: Yes, your Honor.

THE COURT: Anything you want to say about the disposition of the case?

THE DEFENDANT: I'd like to be given a chance to help out my family.

THE COURT: Anything else?

MR. FEDERICO: Nothing further, your Honor. We will submit at this time.

THE COURT: The sentence in indictment 2392 is not more than five years in the Maryland Correctional Institution at Hagerstown; in 2393 not more than one year in the Maryland Correctional Institution in Hagerstown. The Defendant will be referred to the Patuxent Institution for evaluation and treatment, if necessary.

MR. COHEN: Those to run concurrently or consecutively?

THE COURT: Concurrently.

STATE OF MARYLAND, EX REL. EDWARD LEE MCNEIL	IN THE CRIMINAL COURT OF BALTIMORE
VS.	Ind. No. 2392, 2393
PATUXENT INSTITUTION	P.C.P.A. No. 1452

ORDER DENYING RELIEF UNDER THE UNIFORM POST CONVICTION PROCEDURE ACT

THOMAS, J.

The petitioner, Edward Lee McNeil was found guilty on July 17, 1966 in the Criminal Court of Baltimore by Judge J. Harold Grady, presiding without a jury of assault with intent to rape and assault on a police officer. On July 29, 1966, the petitioner was sentenced to not more than five years imprisonment for assault with intent to rape and not more than one year for assault on a police officer, the sentences to run concurrently. On August 29, 1966 an appeal was taken to the Court of Special Appeals of Maryland. On July 21, 1967, the Court of Special Appeals affirmed the judgments of the trial court.

The petitioner is presently confined at the Patuxent Institution under the Defective Delinquent Statute, Article 31B, Annotated Code of Maryland (1967).

In this his second post conviction petition, the petitioner has raised the following contentions.

1. That the petitioner's constitutional rights were violated because the State failed to produce an important State's witness.
2. That the State failed to adhere to the requisites of Article 31B, Section 5, of the Annotated Code of Maryland in that the State had not shown that there was persistent, aggravated, anti-social, or criminal behavior in the petitioner's case history.
3. That the petitioner's criminal sentence has expired.
4. That at the time of his trial, Judge Grady prejudged him.

FIRST CONTENTION—This contention is without merit; the petitioner had ample opportunity to summons anyone that he wanted. Nowhere in the indictment papers does

it indicate that the petitioner summoned Officer Richard Hax. The State is not required to call any particular witnesses to prove its case, but may call whatever witnesses it may need, and need not call those which would not be helpful or would only be redundant. Since the petitioner had the opportunity to summons the officer and failed to do so, it will be deemed waived, and the petitioner may not now raise this contention. *Boucher* v. *Warden*, [redacted]Md. App. 51.

SECOND CONTENTION—The petitioner for this contention relies on Article 31B, Section 5 wherein he contends that he is being improperly held because "The State prior to sending your petitioner to Patuxent Institution, had not shown that there was persistent, aggravated, anti-social or criminal behavior in his case history." Article 31B, Section 6 of the Annotated Code of Maryland (1967) Section 6(a) states:

> "A request may be made that a person be examined for possible defective delinquency if he has been convicted and sentenced in a court of this State for a crime or offense committed on or after June 1, 1954, coming under one or more of the following categories: (1) a felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature. * * *".

Since the crimes of assault with intent to rape, and assault on a police officer, fall into more than one of these categories, it is clear the State had the authority to send the petitioner to Patuxent for examination. The testimony shows that the defendant has not as yet been examined. This is a result of the defendant's refusal to submit to the examination and not the fault of the staff at Patuxent Institution.

A person referred to Patuxent under Section 6, Article 31B for the purpose of determining whether or not he is a defective delinquent may be detained in Patuxent until the procedures for such determination have been completed regardless of whether or not the criminal sentence has

expired, *Mullen* v. *Director*, 6 Md. App. 120. The court was therefore within its power to refer the petitioner to Patuxent and is still within the law in keeping him here until he submits to the examination and the Institution is able to make a determination.

THIRD CONTENTION—The petitioner contends that his criminal sentence has expired. In view of the court's position in the case of *Mullen* v. *Director, supra,* the court is not able to grant relief under this contention.

FOURTH CONTENTION—Petitioner here alleges that Judge J. Harold Grady pre-judged him at the time of his trial. Specifically, the court's attention is drawn to Page 22, lines 5 and 6 of the transcript where the court said, "I think perhaps the State has made out a sufficient case at this point and if it becomes necessary to call the officer in rebuttal you may have leave to do so." In reading the transcript of the trial it does not appear that Judge Grady had pre-judged the petitioner, but rather that the Judge felt that the State had presented a sufficient case. This contention is without merit.

Accordingly, it is hereby ORDERED, the petitioner having failed to present the Court with any contentions which would warrant relief, that this petition for post conviction relief be and the same is hereby denied.

/s/ Basil A. Thomas
Judge

Date: August 17, 1970

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

Application for Leave to Appeal

NO. 150

September Term, 1970

POST CONVICTION

EDWARD LEE MCNEIL

v.

DIRECTOR, PATUXENT INSTITUTION

Anderson
Morton
Orth
Thompson
Powers,
JJ.

Per Curiam

Filed: April 26, 1971

PER CURIAM

In an order filed August 17, 1970 in the Criminal Court of Baltimore, Judge Basil A. Thomas denied the relief sought by Edward Lee McNeil in his second petition under the Post Conviction Procedure Act. After a complete review of the petition, and of the papers filed with the application for leave to appeal, we find the lower court's order to be correct in rejecting each of the contentions raised in the petition. We shall deny the application for leave to appeal.

Application for Leave to Appeal Denied.

SUPREME COURT OF THE UNITED STATES

No. 71-5144, October Term, 19—

EDWARD LEE MCNEIL,

PETITIONER,

v.

DIRECTOR, PATUXENT INSTITUTION

On petition for writ of Certiorari to the Court of Special Appeals Court of the State of Maryland.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 20, 1971

☆ U.S. Government Printing Office: 1972—461-172/510

PETITIONER'S BRIEF

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5144

EDWARD LEE McNEIL,
Petitioner,

v.

DIRECTOR, PATUXENT INSTITUTION,
Respondent.

BRIEF FOR PETITIONER

E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue
Washington, D.C. 20006
Attorney for Petitioner
Appointed by this Court

Of Counsel:
PETER F. ROUSSELOT
RICHARD B. RUGE
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

Washington, D. C. THIEL PRESS 202 393-0625

INDEX

TABLE OF AUTHORITIES

Constitutional Provisions and Statutes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5144

EDWARD LEE McNEIL,

Petitioner,

v.

DIRECTOR, PATUXENT INSTITUTION,

Respondent.

BRIEF FOR PETITIONER

ORDERS AND OPINIONS BELOW

The order and opinion of the Criminal Court of Baltimore City, Maryland, denying McNeil's petition for post-conviction relief, is unreported and is printed at pages 34-36 of the Joint Appendix (hereinafter cited as J.A.). The per curiam order and opinion of the Maryland Court of Special Appeals denying leave to appeal is unreported and is printed at J.A. 37-38.

JURISDICTION

The judgment of the Maryland Court of Special Appeals denying leave to appeal was entered on April 26, 1971. J.A. 37-38. On July 26, 1971, Petitioner filed a pro se Petition for a Writ of Certiorari in this Court. The Court granted certiorari on December 20, 1971. J.A. 39. The undersigned counsel was appointed by this Court to represent Petitioner on January 24, 1972. Pursuant to Rule 34 of this Court and an agreement of the parties, the Clerk directed that Petitioner's brief be filed by April 3, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED [1]

"1. Can a citizen of the State of Maryland be administratively imprison[ed] indefinitely and possibly for life, under Article 31B of the Maryland Code without a judicial determination when [he] is not serving a criminal sentence, solely because he has invoked his Fifth Amendment right to silence?

"2. Is it a violation of the Fourteenth Amendment for the State of Maryland to disregard the specific statutory guidelines of Article 31B section (5), in referring an individual to Patuxent Institution, when there is no law for referral to Patuxent?"

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * * .

---

[1] These questions are quoted verbatim from page 2 of the pro se Petition for a Writ of Certiorari filed by Petitioner on July 26, 1971. They were also adopted by the State of Maryland at page 2 of its Brief in Opposition to that Petition. Pursuant to Rule 40.1.(d)(1) of the Rules of this Court, the argument presented herein includes "every subsidiary question fairly comprised" in the questions originally presented in the pro se Petition.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * * .

The Eighth Amendment to the United States Constitution provides in pertinent part:

> * * * nor [shall] cruel and unusual punishments [be] inflicted.

The Thirteenth Amendment to the United States Constitution provides in pertinent part:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States * * * .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law* * * .

STATEMENT OF THE CASE

Introduction

On July 12-13, 1966, Petitioner Edward Lee McNeil was tried before the Criminal Court of Baltimore City, sitting without a jury, on charges of assault on two police officers and assault with intent to rape. J.A. 3, 13. McNeil took the stand and denied that he had committed the offenses. J.A. 13-23. No defense or evidence of insanity, drunkenness, drug addiction, or other lack of responsibility was offered; indeed, McNeil testified without contradiction that he had graduated from high school, had been employed at the time of his arrest, lived with his parents, and contributed to their support. J.A. 13-14. The charge of assault against one police officer was dismissed. J.A. 13. After finding McNeil guilty of the two other offenses at the conclusion of the trial, the trial judge stated, without further elaboration and despite the

fact that no psychiatric issues had been raised or suggested by either side during the trial:

> While the Court records do not reflect a conviction on any previous charge, I feel from what I know about this young man that a psychiatric report is indicated. The matter will be held sub curia and referred to the Medical Department for a psychiatric evaluation. [J.A. 32.]

Pursuant to this referral, McNeil was examined by John C. Sheehan, M.D., identified as a medical officer.

The report of the medical officer, dated July 19, 1966, found that McNeil's I.Q. (104) "is some twenty points over the average individual seen by this office"; that his "flow of thought was logical and coherent"; and that he "did not appear to have a preconceived concept of acting anti-socially * * * *." In addition, the report found, there was "no evidence of paranoid ideas or delusions," "no evidence of a psychotic distortion of thought," "no evidence of any psychotic process or organic deficit," and "no evidence of any basic thinking disorder * * * ." Notwithstanding these findings, the report, noting repeatedly that McNeil "adamantly and vehemently denies, despite the police reports, that he was involved in the offense" and that McNeil "has a limited tolerance for anxiety and stress," concluded that "I would suggest a diagnosis of personality pattern disturbance, schizoid type, which would emphasize his vulnerability to stress." McNeil's very refusal to admit any offenses in the past was treated as "a pessimistic sign that further offenses may occur." On the basis of this suggested diagnosis, the medical officer recommended that McNeil be "considered for evaluation and treatment" at the Patuxent Institution (hereinafter "Patuxent").[2] His report did not suggest what treat-

---

[2]The medical officer summarized his recommendations about McNeil as follows:

> ***It is difficult to assign a diagnosis to this young man; he is not anti-social in the sense that he uses society as an enemy to be attacked. His unstable character structure does not permit

(Cont'd.)

ment, if any, would benefit McNeil, or whether any appropriate treatment would be available at Patuxent.

The suggestion that McNeil might exhibit "personality pattern disturbance, schizoid type" apparently refers to a possible diagnosis of a particular sub-category of personality disorders ("maladaptive patterns of behavior"), namely, "schizoid personality":

> This behavior pattern manifests shyness, oversensitivity, seclusiveness, avoidance of close or competitive relationships, and often eccentricity. Autistic thinking without loss of capacity to recognize reality is common, as are daydreaming and the inability to express hostility and ordinary aggressive feelings. These patients react to disturbing experiences and conflicts with apparent detachment. [American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d Ed. 1968) at 41, 42.]

All personality disorders are "perceptibly different in quality" from more serious disorders such as psychoses—mental functioning "sufficiently impaired to interfere grossly with [the person's] capacity to meet the ordinary demands of life"—or neuroses—anxiety and other distress symptoms which result in severe handicaps.[3]

The medical officer did not testify at McNeil's sentencing on July 29, 1966, nor was there any hearing on the report. In fact, the report was never referred to by anyone at the sentencing. J.A. 32-33. The court sentenced McNeil on the criminal charges to "not more than five years" in the Mary-

---

adequate control when under stress and we do not know enough about his social life or lack of it. I would suggest a diagnosis of personality pattern disturbance, schizoid type, which would encompass his vulnerability to stress. This young man is certainly a danger to society and the rigidity of his defenses which do not permit a consideration of his offense, even after he has been found guilty, can be taken as a pessimistic sign that further offenses may occur.

[3]American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d Ed. 1968), at 40, 23, 39.

land Correctional Institution at Hagerstown, to run from May 12, 1966.[4] At the same time, without suspending or modifying that sentence, the trial court ordered that McNeil "be referred to the Patuxent Institution for evaluation and treatment, if necessary." J.A. 33.[5]

Statutory Basis for Referral to Patuxent

Virtually any conviction under the Maryland Code may trigger commencement of "defective delinquency" proceedings under Article 31B, which in turn may lead to suspension of the criminal sentence and confinement to Patuxent for an indeterminate period, without maximum limits. Under Article 31B, §6, a defendant convicted of any felony or certain misdemeanors may be "referred" to Patuxent for an examination prior to court determination of whether he may be classified as a "defective delinquent."[6] Referral may be initiated by request from any of the following: (1) the Department of Correction, (2) the trial prosecutor, (3) the

---

[4]McNeil received concurrent sentences of not more than five years for assault with intent to rape and not more than one year for assault on a police officer. J.A. 33.

[5]On the same day, the trial judge signed a printed form ordering McNeil's examination at Patuxent. After reciting that there was "reasonable cause to believe that the Defendant may be a Defective Delinquent * * *," the form directed that the defendant be "delivered to the custody of the Director of Patuxent Institution, for observation, examination and evaluation for the purpose of determining whether or not he is a Defective Delinquent * * *," and, that "the Defendant shall remain in the custody of the Director of Patuxent Institution until such time as the Court shall have received a written report on the Defendant from the Institution and shall issue its further Order in the premises."

[6]Article 31B, § 5, defines "defective delinquent" as "an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."

defendant, (4) defense counsel, (5) the trial court, or (6) any other court having jurisdiction over the convicted defendant. While a request for such an examination by the State must set forth the reasons for "suspecting or supposing the presence of defective delinquency," an examination request originating with the court or with the convicted defendant apparently need not set forth any reasons (Article 31B, §§ 6(b), 6(d)), and no reasons were specified by the court in the instant case. The statute does not establish any procedure by which the defendant or his counsel can contest the referral, which may lead—as is the case here— to commitment for an indefinite term exceeding the criminal sentence.

Article 31B, §6(e), provides that after a person is transferred to the custody of Patuxent, he shall remain in that Institution's custody "until such time as the procedures of [Article 31B] for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired." Under Article 31B, §7(a), the examination is made at least by a psychiatrist, a psychologist and a physician "on behalf of the institution." The institution must assemble "all pertinent information about the person to be examined," including (1) a complete statement of the crime for which the defendant has been sentenced; (2) "the circumstances of such crime," and (3) copies of any probation or other previously prepared reports describing the defendant's "social, physical, mental and psychiatric condition and history."

On the basis of all such assembled information, "plus their own personal examination and study" of the defendant, the institutional staff "shall state their findings" as to defective delinquency in a written report to the court. Article 31B, §7(a). The statute at the time of McNeil's referral required that the report be filed no later than six months from the date the person was transferred to Patuxent for examination, or before expiration of his sentence, whichever last

occurs[7]—a requirement not complied with in this case. The examination normally employs "recognized psychiatric techniques, including, among other things, a psychiatric interview and evaluation in depth, a full battery of psychological tests, full sociological and social work studies, including electroencephalographic studies, review of past history and records, including police, juvenile, penal and hospital records; and, in addition, personal interviews * * * with the accused, are held."[8] And the chief psychologist at Patuxent has testified that the personal interviews with the accused include "a series of questions to elicit and to determine the past criminal record, antisocial and criminal behavior of the individual."[9]

If the required report concludes that the convicted defendant should not be classified as a defective delinquent, he is retained in the custody of the Department of Correction under his original sentence with full credit given for the time confined at Patuxent. Article 31B, § 7 (a). If the report takes the position that the defendant should be classified as a defective delinquent, a hearing is then held

---

[7] 3 Md. Code Article 31B, §7(a) (1957 ed., 1966 Supp.). The statute was amended effective July 1, 1971, to require that the report be filed no later than six months from the date the person was transferred to Patuxent, or three months before expiration of his sentence, whichever *first* occurs. 1971 Laws of Maryland, Ch. 491; 3 Md. Code Article 31B, § 7(a) (1971 Supp.). The report is thus overdue by from eleven months to five years, depending on which version of the statute is applicable.

[8] *Director v. Daniels*, 243 Md. 16, 57, 221 A.2d 397, 421, *cert. denied sub nom. Avey v. Boslow*, 385 U.S. 940 (1966).

[9] Testimony of Dr. Arthur Kandel, *Sas v. Maryland*, 295 F. Supp. 389 (D. Md. 1969), *aff'd sub nom. Tippett v. Maryland*, 436 F.2d 1153 (4th Cir.), *cert. granted sub nom. Murel v. Baltimore City Criminal Court*, 404 U.S. 999 (1971) (No. 70-5276, 1971 term) (pending). The testimony appears at page 236 of the Joint Appendix before the Fourth Circuit in *Tippett*, which has been filed as part of the record before this Court in *Murel*. (Hereinafter, said Joint Appendix is cited as "Murel J.A. 4, at ____.")

pursuant to Article 31B, § 8, at which the defendant can challenge the proposed finding. At that hearing, which can be accelerated at the defendant's request, he has the right to counsel (including appointed counsel) and trial by jury. McNeil has never received this hearing.

If the court or jury determines on a proponderance of the evidence that the defendant does meet the statutory definition, the court must "order him to be committed or returned to the institution for confinement as a defective delinquent, for an indeterminate period, without either maximum or minimum limits."[10] In that case, "the sentence for the original criminal conviction * * * shall be and remain suspended, and the defendant shall no longer be confined for any portion of said original sentence." Article 31B, § 9(b). Once so committed after hearing, the defendant can appeal the finding and otherwise petition for review (Article 31B, §§ 10-11), and Patuxent must "thoroughly re-examine" him once a year. A person committed to Patuxent after hearing can subsequently be granted parole, work release, or other leave of absence by the institution, and can be released conditionally or unconditionally on court order (or be transferred to serve the remainder of his original sentence). Article 31B, § 13. Since no hearing has ever been held to determine whether McNeil constitutes a "defective delinquent," he has been denied even those rights and privileges granted persons classified as defective delinquents after court hearing and committed to Patuxent.

Referral of McNeil in 1966

Pursuant to the court's order of July 29, McNeil was transferred to Patuxent on August 10, 1966. From that date to the present, he has remained on the "receiving tier"

---

[10] Should the court or jury determine that the defendant does not constitute a defective delinquent, his period of confinement on his conviction resumes under custody of the Department of Correction, with credit given for time spent at Patuxent. Article 31B, § 9(a).

at Patuxent, with no rehabilitative treatment, solely because he has refused on at least 15 separate occasions[11] to submit to the full battery of psychiatric tests and questions which Patuxent insists on imposing before it will either file a report as to whether a convicted defendant should be classified as a "defective delinquent" or provide treatment to that person.[12]

Patuxent's initial three attempts to examine McNeil occurred while the direct appeal from his criminal conviction was pending.[13] On that appeal, McNeil contended, *inter alia*, that his conviction should be reversed because it was against the weight of the evidence (primarily his own testimony) that he had not participated in the crimes charged. It was also while this direct appeal was pending

---

[11] As outlined in Exhibit A to this brief, the official Patuxent file on McNeil (File No. D-1885) lists at least 15 such occasions between 1966 and 1972 on which he refused to undergo a complete psychiatric evaluation as requested by the Patuxent staff. Apparently, on at least two occasions in January, 1970, McNeil requested a consultation with Patuxent psychiatrists, but the staff did not respond to these requests. The reason for these two requests does not appear in the record, but it may be that McNeil was attempting to avoid disciplinary action by telling the staff personally he would continue to refuse the psychiatric evaluation. See note 54, *infra*. In any event, we can assume that McNeil would not have submitted to psychiatric testing and evaluation had his requests for consultation been heeded, because when Patuxent, on its own initiative, asked McNeil to submit to testing several months later (June 9, 1970), he refused, and has continued to do so to the present date.

[12] Inmates in the diagnostic stage are not allowed to participate in the therapy program. Murel J.A. 4, at 206. See also pages 414 and 634-635 of the Joint Appendix before the Maryland Court of Appeals in *Director v. Daniels, supra*. That Joint Appendix has been filed as part of the record before this Court in *Murel v. Baltimore City Criminal Court, supra*, and is hereinafter cited as "Murel J.A. Md., at _____."

[13] The conviction was affirmed by the Court of Special Appeals of Maryland in an unreported opinion dated July 21, 1967. 1 Md. App. 697. The Court of Appeals of Maryland denied certiorari on November 6, 1967.

that the Director of Patuxent advised the Baltimore City Criminal Court by letter that the institution had been "unable to make the examination required by Section 7 of [Article 31B] because Mr. McNeil has refused to submit to testing and to other examinations."[14] This letter—copies of which were sent to the Attorney General of Maryland and to the State's Attorney for Baltimore City but *not* to McNeil or his attorney—was written eight days after the "mail censor" at Patuxent recorded in McNeil's file that McNeil had written the United States District Court in Baltimore, complaining that Patuxent had refused to determine his "defective delinquency" status, asserting that Patuxent had an obligation to make a diagnosis one way or the other with or without his cooperation, and advising the court that he had "purposefully not cooperated with the diagnostic study. because * * * this is his right."[15] The Baltimore City Criminal Court apparently took no action in response to notice from Patuxent that the institution was not planning to submit the evaluation report required by the statute, and in any event, no hearing has ever been held to determine whether McNeil was or is a defective delinquent subject to indeterminate commitment to Patuxent.

The fourth demand that McNeil undergo psychiatric tests did not occur until November 6, 1968—more than two years after McNeil had refused the third request—although the chief psychologist at Patuxent testified in the *Murel* case on May 1, 1968, that such examinations are "usually * * * repeated or followed up every six months, and sometimes more frequently." Murel J.A. 4, at 282. This fourth refusal occurred during the period that McNeil's first

---

[14] The letter, dated May 23, 1967, from Harold M. Boslow, M.D., to the Honorable Albert L. Sklar, Baltimore City Criminal Court, is part of the Patuxent file (No. D-1885) on McNeil.

[15] This letter, dated May 15, 1967, from McNeil to the Honorable Roszel C. Thomsen, is reported in Patuxent File No. D-1885, on the "Progress Sheet."

petition for release under Maryland's Post Conviction Procedure Act (Md. Code, Article 27, § 645A) was pending in the Maryland Court of Special Appeals, having been denied by the Baltimore City Criminal Court.[16] In his pro se application for leave to appeal to the Court of Special Appeals, McNeil was contending, *inter alia*, that he should be released inasmuch as his arrest had been made without probable cause because the facts showed (based primarily on his own testimony) that he had not been engaged in any conduct justifying an arrest.

Ten of McNeil's remaining eleven other recorded refusals to submit to psychiatric examinations and testing, which would have delved into, among other things, the circumstances of the offenses for which he was convicted, occurred during the pendency at the trial or appellate level of his second petition for release from confinement.[17] In his second petition, prepared pro se on December 29, 1969, and filed on January 23, 1970, in the Baltimore City Criminal Court, McNeil stated:

> I have been incarcerated in Patuxent for more than (3) three years waiting for either Defective Delinquent Proceedings against me, or release from Patuxent back to the Department of Correction; neither has occurred, and it appears that if I do not myself, take it upon myself to do something, I will remain here and *"rot"* forever. [Emphasis in original.]

---

[16] McNeil's application for leave to appeal to the Maryland Court of Special Appeals was denied in an unreported per curiam opinion dated November 21, 1968. 5 Md. App. 745. *McNeil v. Director*, No. 66 (Md. Ct. Spec. App., September Term, 1968).

[17] This Court granted certiorari herein on December 20, 1971, with respect to the judgment of the Maryland Court of Special Appeals (J.A. 37-38), refusing leave to appeal from denial of McNeil's second post-conviction petition for release from confinement. McNeil's one remaining recorded refusal took place on July 25, 1969, after his first petition for release from confinement had been rejected by the Maryland Court of Special Appeals and before his second petition had been filed.

However, the Baltimore City Criminal Court rejected McNeil's challenge to the failure to institute defective delinquency proceedings against him and held, in an opinion dated August 17, 1970, that the court which had convicted McNeil and sent him to Patuxent was "within the law in keeping him there until he submits to the examination and the Institution is able to make a determination." J.A. 36. The Maryland Court of Special Appeals refused leave to appeal in an unreported, one-paragraph per curiam opinion issued April 26, 1971. J.A. 37-38.

McNeil would have been released over four years ago if he had been confined at the Maryland Correctional Institution in Hagerstown and served the minimum time provided by law with respect to his sentence,[18] and he would have been automatically and unconditionally released almost one year ago had he served his full criminal sentence. Instead, he remains confined today at Patuxent, and the State promises to keep him there indefinitely—with no rehabilitative treatment or training—so long as he refuses to submit to psychiatric and psychological examinations by the Patuxent staff. On December 20, 1971, this Court granted McNeil's pro se petition for a writ of certiorari to review his confinement, which has continued even though no judicial hearing has ever been held to commit him indefinitely.

SUMMARY OF ARGUMENT

McNeil has been confined at Patuxent Institution for defective delinquents beyond his criminal sentence. No report asserting that McNeil should be classified as a "defective delinquent" has ever been filed, and no hearing as to his status as a "defective delinquent" has ever been held. To prevent just such abuse of statutes designed for the commitment of predicted offenders, this Court has

---

[18] Md. Code, Article 41, § 124 (1965 ed.); Article 41, § 122 (1970 Supp.) (prisoner eligible for parole after one-fourth his sentence).

surrounded indeterminate confinement procedures—whether denominated civil or criminal—with constitutional guarantees of due process and equal protection. McNeil's continued confinement without hearing or treatment clearly violates both those constitutional rights and others listed below.

Courts have particularly insisted that due process guarantees be scrupulously observed where commitment extends beyond termination of a criminal sentence. In sharp contrast to the Maryland law, the federal statute requires a judicial hearing before a federal prisoner may be committed past his sentence. The State's insistence here that the evaluative report required by Maryland law cannot and need not be prepared unless the defendant submits to its psychiatric examination not only flouts due process guarantees requiring a hearing before indefinite confinement, but rests on the inaccurate factual assumption that answers to the staff's questions are an absolute prerequisite to an evaluative report. The State's refusal to do anything—to make an evaluative report on McNeil, to hold a judicial hearing as to his status, or to offer him rehabilitative treatment—cannot be sustained.

In addition, the privilege against self-incrimination forbids confining McNeil indefinitely at Patuxent as the price for refusing to submit to questioning by doctors and others on the Patuxent staff. The overwhelming evidence shows that the staff seeks to question each referred inmate in detail about his past criminal activities, and that his answers may incriminate him in at least four different respects, as outlined below. For the reasons discussed herein, the purpose in asking the questions, the success or failure of Patuxent as a treatment facility, and the label attached to defective delinquency proceedings are constitutionally irrelevant in assessing the substantial dangers of self-incrimination that face any inmate who answers Patuxent's questions.

ARGUMENT

There is an awful simplicity about this case. Without a hearing, McNeil was committed to Patuxent against his will and without any application on his part, for a determination of whether he should thereafter be confined for an indefinite period. When he refused to submit to testing by officials at the institution, the State continued to confine him, even after his original criminal sentence had expired, and claims in this Court the right to keep him confined forever—all without any hearing, judicial or otherwise.

The State does not claim this right because McNeil is a defective delinquent; he has never been found to be a defective delinquent by anyone. The State does not claim this right because McNeil must receive treatment; he receives no treatment at all as he is presently confined, and he will remain confined without treatment if the State's position is upheld. Instead, the State claims the right to confine him indefinitely solely because he refuses to submit to its evaluation procedure.

Even if McNeil's refusal were purely quixotic—for no reason or for no defensible reason—this indefinite confinement would be unconstitutional, since no one can be deprived of his liberty without a hearing and its attendant protections inherent in our concept of due process. But in this instance, McNeil's reason is far from quixotic. On the contrary, he refuses to submit to the institution's examinations because those who are questioning him seek incriminating information from his own mouth which can thereafter be used either to incarcerate him for crime or to brand and confine him indefinitely as a defective delinquent. It is thus the very exercise of his rights under the Fifth Amendment which the State uses to justify his confinement. The confinement is therefore doubly unconstitutional—because of a total lack of a judicial determination that he should be confined at all, and because his refusal to incriminate himself is made the basis and excuse for his continued loss of liberty.

I. McNEIL'S CONFINEMENT FOR LIFE WITHOUT A JUDICIAL HEARING VIOLATES CONSTITUTIONAL GUARANTEES.

(a) Due Process.

On July 29, 1966, the trial judge, after receiving the medical officer's report, sentenced McNeil on the assault convictions to not more than five years in the Maryland Correctional Institution at Hagerstown. As the court knew, this sentence was subject to statutory reductions for good behavior, industrial or agricultural work, and satisfactory progress in education or vocational courses,[19] and McNeil would have been eligible for parole after one-fourth the term,[20] or in a little over one year. Although the five-year sentence reflected the trial court's judgment as to the maximum period McNeil should be confined before being restored to normal life in the community, McNeil remains at Patuxent today without any judicial finding that he would constitute a danger to society if released or that he needs treatment and can receive it only while confined.

Indeed, McNeil's continued confinement—four years and eight months after his minimum sentence has expired and almost a year after his maximum sentence has expired—derives solely from the initiation of the *first step* (referral to Patuxent) in the statutory proceeding for indefinite commitment of "defective delinquents." Md. Code, Article 31B. The State has refused to comply with the second required initiating step in the statutory scheme (report by Patuxent), and asserts its right to hold McNeil for life if he will not submit to Patuxent's psychiatric examination. Based on standard mortality tables, such confinement without hearing could continue until the year 2012[21] —another 40 years.

---

[19]Md. Code Article 27, § 688 (1957 ed.); Article 27, §700 (1957 ed., 1966 Supp.); Article 27, § 700 (1971 ed.).

[20]See note 18, *supra.*

[21]N.Y. Times Encyclopedic Almanac (1972), at 304 (life expectancy of nonwhite male now age 25 is 40 years).

To prevent just such an abuse of statutes designed for the commitment of predicted offenders (such as "defective delinquents" or "sex offenders"), this Court has surrounded indeterminate confinement procedures, whether denominated civil or criminal, with constitutional guarantees of due process and equal protection. *Specht v. Patterson*, 386 U.S. 605 (1967); *Baxstrom v. Herold*, 383 U.S. 107 (1966). In *Specht*, the defendant had been convicted of a sex offense in violation of state criminal law. A separate statute authorized indeterminate confinement if the trial court found that a person convicted of specified sex offenses "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." Although the latter statute required submission to the trial judge of a psychiatric report stating whether the convicted defendant could be treated under the statute or could be adequately supervised on probation, this Court held that the State's failure to hold a hearing prior to commitment as a "sex offender" at which the defendant had an opportunity to challenge the report and his possible confinement—by appearing with counsel, confronting witnesses against him, and presenting evidence of his own—violated the Due Process Clause of the Fourteenth Amendment. The Maryland "defective delinquency" law, like the sex offender act in *Specht*, is triggered by a criminal conviction and requires a "new finding of fact * * * that was not an ingredient of the offense charged", 386 U.S. at 609; the invocation of the defective delinquency law thus raises a "distinct issue" on which the defendant "must receive reasonable notice and an opportunity to be heard." *Id.* at 610.

The Court in *Specht* quoted with approval (386 U.S. at 609-610) the Third Circuit's ruling that "partial or niggardly procedural protections" cannot satisfy due process guarantees where the State's reluctance to provide a "full judicial hearing" before invocation of a "sex offender" statute (again like the Maryland defective delinquency law) could result in unjustified confinement for life. *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302

(3d Cir. 1966). The Third Circuit held in *Gerchman* that the trial court could not apply the post-conviction statute solely on the basis of a report from the State's mental health agency, without conducting a full hearing, even though after his commitment the defendant would receive "advanced, modern methods of cure and rehabilitation" and the institution would determine every six months whether he should be released. 355 F.2d at 310. The trial court had made "a new factual finding [that the defendant would constitute a danger to society if not confined] which went substantially beyond the finding of guilt of assault and battery with intent to ravish," 355 F.2d at 311; the defendant's potential life confinement exceeded the term of imprisonment he would otherwise have served (five years at most); and the failure to give him a full hearing, including the opportunity to confront and cross-examine witnesses, therefore violated due process guarantees. 355 F.2d at 313.

More recently, in *Humphrey v. Cady*, 40 U.S.L. Week 4324 (U.S. March 22, 1972), this Court noted that the Wisconsin sex crimes statute under review appeared to condition indefinite commitment to a "sex deviate facility" (in lieu of criminal sentence) "not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty." Where such a determination must be made, a hearing before a jury "serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment". 40 U.S.L. Week at 4325 (footnotes omitted).

Thus even if the trial judge in the instant case had received a report concluding that McNeil should be classified as a "defective delinquent," and even if the statute had authorized the court to act on that report without a full

hearing on McNeil's status, the *Specht*, *Humphrey*, and *Gerchman* decisions would clearly invalidate his continued confinement.[22] In fact, however, no report finding McNeil to be a "defective delinquent" has ever been filed.[23] His continued confinement, lasting beyond the expiration of his criminal sentence, derives solely from his "referral" to Patuxent in 1966 "for observation, examination and evaluation for the purpose of determining whether or not" he should be classified as a defective delinquent. The printed referral order form used by the trial court (note 5, *supra*) contains only the unsubstantiated conclusion that the court has "reasonable cause to believe that the Defendant may be a Defective Delinquent * * *." No man can be indefinitely confined without a hearing on the assertion that there is reasonable cause to believe that he may have committed a crime; even less can a man be indefinitely confined without a hearing on the assertion that there is reasonable cause to believe that he may evidence "a propensity toward criminal activity * * *."[24]

---

[22] *See also Miller v. Blalock*, 411 F.2d 548 (4th Cir. 1969) (State's interest in protecting its citizens from mentally ill persons with violent tendencies does not justify commitment without hearing); *Heryford v. Parker*, 396 F.2d 393, 397 (10th Cir. 1968) (civil commitment of child as "feeble-minded" without according due process hearing may "work shameful injustice"); *Huebner v. State*, 33 Wisc.2d 505, 147 N.W.2d 646 (1967) (due process requires hearing on sex offender's mental condition and need for treatment before confinement). In *Anderson v. Solomon*, 315 F. Supp. 1192, 1195 (D. Md. 1970), the court relied on *Heryford v. Parker*, *supra*, and *Specht v. Patterson*, *supra*, in concluding that Maryland's involuntary civil commitment statute (Article 59) raises "a number of serious constitutional issues," inasmuch as the law permits indefinite confinement on the certificate of two physicians, without prior hearing or mandatory subsequent hearing. The issue of the statute's constitutionality was held in abeyance pending determination of other issues.

[23] The only medical report ever filed concerning McNeil was the one submitted to the trial court prior to McNeil's referral to Patuxent, and this report merely suggested a diagnosis and recommended that he be "considered for evaluation and treatment" at Patuxent.

[24] *See* Md. Code, Art. 31B, §5, defining "defective delinquent."

As a matter of fact, even the trial court's initial, ex parte referral of McNeil to Patuxent violated due process, regardless of what transpired thereafter. In *Kent v. United States*, 383 U.S. 541 (1966), this Court held that a juvenile court—functioning as *parens patriae* to determine the needs of both the accused and society, not to adjudicate criminal conduct—could not waive jurisdiction without a hearing, even though it had received a psychiatric report on the defendant and recited in its waiver order that it had conducted a "full investigation." Since waiver constitutes a "critically important" action determining important statutory rights, drastically increasing the accused's possible confinement, the statutory provisions authorizing waiver, as "read in the context of constitutional principles relating to due process * * *", entitled the accused to a full hearing. *Id.* at 557. See also *Humphrey v. Cady, supra.* The referral to Patuxent constituted an equally important judicial decision, setting in motion a statutory procedure authorizing indefinite commitment, and appears equally defective under the Due Process Clause.[25] The fact that McNeil did not raise an insanity defense at trial makes the lack of hearing on the initial referral an even more significant denial of due process. And since McNeil's continued confinement derives from his initial referral to Patuxent in 1966, constitutional defects in that "proceeding" underscore the flagrant due process violation involved in his indeterminate confinement without treatment.

However, whether or not the initial referral can be viewed as valid, the fact remains that McNeil continues to be confined without any hearing whatever and without any

---

[25]The fact that the statute calls for a later hearing on the ultimate issue (here, status as a "defective delinquent"), affording the defendant somewhat greater protection, does not insulate the triggering decision from constitutional scrutiny. *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Although the issue need not be faced in this case, McNeil does support the constitutional challenges to the defective delinquency hearing made in Brief for Petitioners at 22-38, 73-76 and Brief for Amicus Curiae at 57-74, *Murel v. Baltimore City Criminal Court, supra.*

hope of one. It is no answer to say that he refuses to "cooperate." Regardless of his reasons, McNeil has never—by implication or otherwise—waived his right to a judicial hearing on his confinement. If a refusal to cooperate with authorities were grounds for denying a hearing, anyone who declined to answer questions posed by an arresting officer could be imprisoned without a court determination of guilt.

Courts have particularly insisted on due process guarantees where state law authorizes civil commitment without hearing after a defendant has served his criminal sentence. For example, in *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971), the District Court relied on *Specht v. Patterson, supra*, to hold unconstitutional on its face a statute authorizing the commitment to a state hospital of a prisoner once his sentence has expired, based solely on certificates of mental disability from two hospital staff physicians. Rejecting the argument that due process protections can be swept away because the proceedings are "intended to help and rehabilitate," the court rested the burden on the State to produce "reliable" evidence which "clearly, unequivocally and convincingly" establishes that hospital confinement is required. 325 F. Supp. at 974. See also *People v. Breese*, 34 Ill.2d 61, 213 N.E.2d 500 (1966); *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 215 N.Y.S.2d 44, 174 N.E.2d 725 (Ct. App. 1961).[26]

During the oral argument of the *Murel* case (No. 70-5276), Chief Justice Burger and Mr. Justice Blackmun inquired as to whether there was a federal procedure comparable to that employed by Maryland. The federal procedure is indeed instructive. By statute in force since 1949, a judicial hearing must be granted before a federal prisoner whose sentence is about to expire can be committed as insane or mentally incompetent and dangerous to the community. 18 U.S.C. §4247. The commitment procedure is initiated by a certi-

---

[26] By contrast to Maryland law, the Connecticut statute recognizes termination of criminal sentence as requiring a court hearing if the state seeks continued confinement of a person believed mentally ill. Conn. Gen. Stat. Ann. §§ 17-197, 17-245, 17-246.

ficate as to the specified conditions from the Director of the Bureau of Prisons and by a report from the particular prison's board of examiners. 18 U.S.C. §4241. The District Court having jurisdiction over the prisoner's place of confinement then designates two psychiatrists, one chosen by the court and one by the prisoner, to examine him. At the hearing, the psychiatrists submit their reports, and other pertinent records relating to the prisoner's mental condition are considered. All persons who have examined the prisoner are subject to cross-examination by him, and the court may summon other witnesses for the prisoner. Only after holding a full hearing and after finding that the specified conditions exist can the court commit the prisoner to the custody of the Attorney General for further confinement once his sentence expires. The House Report on the legislation adding 18 U.S.C. § 4247 points out that an initial version of the bill was amended to insure the prisoner a full hearing "before his liberty is further restrained," by making it mandatory (rather than discretionary) for the court to provide for an examination by a qualified psychiatrist chosen by the prisoner and for the summoning of additional witnesses on his behalf. These amendments to the initial bill were termed "essential for the protection of the prisoner." H.R. Rep. 1319, 81st Cong., 1st Sess. (1949).[27]

---

[27] A similar judicial hearing must be held after issuance of a certificate that a person charged with a federal offense may not be competent to stand trial, or that a person imprisoned on a federal conviction may have been mentally incompetent at trial. 18 U.S.C. §§ 4244-4246. On its face, 18 U.S.C. §4241 authorizes the Attorney General to transfer mentally ill federal prisoners to hospital facilities after examination by the prison's board of examiners, but without hearing, *said hospital confinement not to continue beyond the prisoner's maximum sentence.* However, the District of Columbia Circuit has held that constitutional guarantees require a full judicial hearing before transfer to St. Elizabeths Hospital of mentally ill prisoners under a D.C. statute (24 D.C. Code § 302) similar to the federal prisoner transfer statute (18 U.S.C. §4241). *Matthews v. Hardy*, 420 F.2d 607 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970). While resting its decision on equal protection considerations, the court stated that failure to grant a full hearing (even though not

(Cont'd.)

Although the Maryland statute requires Patuxent to file with the referring court within a specified period of time (note 7, *supra*) a report stating its findings as to whether the defendant should be classified after hearing as a "defective delinquent" (Article 31B, § 7(a)), the State asserts that the report cannot and need not be prepared unless the defendant submits to its psychiatric examination, and that no defective delinquency hearing will be held until a report is filed. In short, the State asserts that it can confine the inmate not only beyond the statutory period for the report but until he cooperates or dies, whichever first occurs, in an institution designed for the segregation and treatment of "defective delinquents," even though the referred defendant has not been classified as a defective delinquent and even though Patuxent denies him the treatment furnished to those who have been so classified.[28] The State's position

---

called for by the statute) would raise a "substantial" due process issue. 420 F.2d at 612 n. 14.

Likewise, a full judicial hearing must be held as to a narcotic addict's eligibility for treatment under the Narcotic Addict Rehabilitation Act of 1966, although not expressly required by the statute. 18 U.S.C., § 4253. In *United States v. Carroll*, 436 F.2d 272 (D.C. Cir. 1970), the court ruled that the Act "is in essence a classification statute in which an adverse determination that a person is a member of a class has an immediate effect upon his personal liberty. As a member of the class of eligible offender addicts, individuals may be committed to a program in which the maximum term of confinement is determined more with respect to status within the class (*e.g.*, their progress as patients) than with reference to the gravity of the offense which brings them initially within the ambit of the statute. Since personal liberty is vitally affected, the Fifth Amendment requires that due process of law be applied to the classification process. And notice of the facts supporting the contemplated classification, along with an opportunity to test or reply to these facts, is beyond doubt an important part of this due process requirement * * *." 436 F.2d at 273-274.

[28] A defendant who arrives at Patuxent for evaluation is placed on the recieving tier—one of seven levels of cells used by the institution. Murel J.A. Md., at 849. Normally, an inmate is promoted from tier to tier through cooperation, progress, rehabilitation, etc. No one leaves the

(Cont'd.)

cannot be sustained under the decisions cited herein making due process guarantees a condition precedent to indefinite commitment. But in addition, the State's position rests on an inaccurate factual assumption—namely, that the defendant's answers to officials' questions are an absolute prerequisite to a report on defective delinquency.

Two different circuit court judges in Maryland have recently conducted evidentiary hearings at which Patuxent staff members testified that the institution could not file the required evaluation report absent a personal interview, and at which other physicians specializing in psychiatry testified that an opinion as to defective delinquency can be based on data available in the inmate's file at Patuxent.

(i) In the earlier case, *McKenzie v. Director*, Law No. 39033 (Circuit Court for Prince George's County, unreported opinion and order filed July 7, 1970), Dr. Harold M. Boslow, Director of Patuxent, stated that he could not make an evaluation of defective delinquency if the inmate refused to speak because it would be "slipshod" and "unprofessional." On the other hand, Dr. Brian Crowley, a psychiatrist formerly on the staff of St. Elizabeths

---

receiving tier, however, until a report on him has been filed with the court and he has been formally committed, so that McNeil has remained on the receiving tier for almost six years. Inmates on this tier are not allowed to receive either personal or group therapy and in fact must remain in their individual cells all day except for two hours in a small exercise yard. Murel J.A. Md., at 414, 429-430, 616-617, 628; Murel J.A. 4, at 70, 73, 181, 206, 223. This occurs despite the facts that psychiatrists believe diagnostic and treatment procedures should go hand-in-hand and contemporaneously (Murel J.A. Md., at 112-113), and that treatment has repeatedly been described as one of the primary objectives at Patuxent. Murel J.A. Md., at 215, 305, 392, 556, 671; Murel J.A. 4, at 292-293; Boslow and Manne, "Mental Health In Action—Treating Adult Offenders at Patuxent Institution," Crime and Delinquency (January 1966); Boslow, Rosenthal, Kandel and Manne, "Methods and Experiences in Group Treatment of Defective Delinquents in Maryland," 7 J. Soc. Therapy (1961); Manne, "A Communication Theory of Sociopathic Personality," XXI Amer. J. of Psychotherapy (1967).

Hospital,[29] testified that the file material on McKenzie justified "a medical opinion to a reasonable medical certainty * * *." Weighing the conflicting testimony, Judge William B. Bowie concluded "that there can be a proper evaluation of defective delinquency even though an individual refuses to submit to the complete examination given at Patuxent." The court also cited the earlier testimony of Dr. Manfred S. Guttmacher, Chief Medical Officer of the Supreme Bench in Baltimore, in *Director v. Daniels, supra,* that diagnosis of a referred inmate who "remains completely silent" would require "a long period of surveillance * * *." Murel J.A. Md., at 258. The circuit court said that the time spent by McKenzie at Patuxent without evaluation—more than five years, extending beyond his criminal sentence—provided that institution with a "long period" of observation and ordered Patuxent to submit the statutory report within 30 days.[30]

By letter to the court dated July 28, 1970, Dr. Boslow stated:

---

[29]Dr. Crowley, who practices psychiatry at the Potomac Foundation for Mental Health, Bethesda, Maryland, is an assistant clinical professor of psychiatry at the George Washington University School of Medicine. He has lectured at Catholic University Law School and served as consultant to the Montgomery County Health Department.

[30]Patuxent officials repeatedly emphasized in *Murel* the extraordinary amount of information available to them other than that obtained from incriminating answers to questions posed to the inmate. This information comes from interviews with the inmate's family, relatives, friends and employers; reports and records from the police and F.B.I., courts (including juvenile), institutions, hospitals (including psychiatric), schools, probation departments, and the medical office of the Supreme Bench; tests such as the Wechsler-Bellevue Intelligence Test, the Rorschach Ink Blot Test, the Draw-A-Person Test, Encephalographic brain tests, and Pneuencephelogram (air brain) studies; and impressions gleaned from personal surveillance of the inmate while at Patuxent. *E.g.*, Murel J.A. Md., at 111-112, 172, 173, 181, 233, 258, 277, 279, 282, 533-539, 621-624, 661, 664; Murel J.A. 4, at 205, 209, 212-213, 225, 232, 540-541.

> It is the opinion of the staff of this Institution that Lawrence Harper McKenzie is a Defective Delinquent * * *.

The accompanying report filed with the court notes that McKenzie had refused to be examined on 16 occasions during his confinement at Patuxent. Nonetheless, the report presents three single-spaced pages of information about McKenzie,[31] drawn from F.B.I. and police records, military records, a "social history questionnaire" completed by McKenzie's sister, certain comments he made to a "classification officer" and psychologist (apparently at Patuxent) some six years prior to the report, yearly physical examinations at Patuxent, an interview with an administrative official at his high school, and observation of his behavior at Patuxent for more than five years.[32] The report—signed by Dr. Boslow, a psychiatrist, a psychologist, and a medical physician—concluded that McKenzie "is, on the basis of history alone, a clear and present sexual danger to children in the community" and recommended his commitment (after the statutory hearing) as a defective delinquent.[33] A

---

[31] Dr. Boslow, Director of Patuxent, testified in *McKenzie* that the amount of the institution's data on McKenzie was "about average" in comparison with the data on others referred for evaluation. Tr. of Proceedings before Judge Bowie, Circuit Court for Prince George's County, Maryland, May 1, 1970, at 78.

[32] The report states as to McKenzie's behavior at Patuxent: "This patient's activity during six years in Patuxent Institution has, for the most part, consisted of an attempt on his part to redress so-called 'grievances,' including a suit against the mail censor at the Institution, indignation at the attempt of the Institution to identify visitors to the Institution, concern about the price of goods sold in the Institution commissary, and of course, attempts on his part to obtain his release from the Institution. Of particular note, in light of his past history, is a disciplinary infraction received early in his incarceration here for manually masturbating another patient during the course of a Protestant church service."

[33] The concluding paragraph of the report reads: "This patient has never been examined by the Institution Diagnostic Staff. While on the

(Cont'd.)

court hearing as to whether McKenzie is in fact a defective delinquent has not yet been held.

(ii) Dr. Harvey Kelman, the Patuxent staff psychiatrist who signed the July 28, 1970, evaluation report on McKenzie despite McKenzie's refusals to submit to a diagnostic examination, testified in the later circuit court case that a personal interview is "indispensable" to such an evaluation. *Davis v. Director,* Misc. Pet. # 4410 (Circuit Court for Montgomery County, Maryland, unreported opinion and order dated December 11, 1971). Judge Plummer M. Shearin, after consideration of the testimony by Dr. Kelman, Dr. Crowley, and another psychiatrist and of the relevant statutory provisions, held that the failure to diagnose Davis despite his four-year confinement at Patuxent (during which his criminal sentence had expired) required his immediate release.

Judge Shearin found that "direct verbal communication between inmate and psychiatrist, although desirable, is not indispensable" to making the report required by statute,[34]

---

basis of the information available to us he might seem to satisfy the criterion of Defective Delinquency by virtue of his repeated antisocial activity and obvious danger to children, as well as the possibility of some inferred emotional unbalance, such a conclusion would be open the revision by the provision of some modicum of information from the patient. Since the Court has ordered an 'examination' and recommendation in regard to this patient, the only recommendation that can be made here is that he be committed to this Institution as a Defective Delinquent since he is, on the basis of history alone, a clear and present sexual danger to children in the community."

[34] See, *e.g.*, Kolb, *Noyes' Modern Clinical Psychiatry* (7th Ed. 1968), at 158-159, listing some 50 diagnostic questions which can be answered by observing "inaccessible" patients who are unwilling or unable to speak or otherwise cooperate in a mental examination; Cheney, ed., *Outlines for Psychiatric Examinations* (2d. Rev. Ed. 1940), at 86-88, enumerating valuable observations which can be made in the examination of "uncooperative" patients; Cammer, *Outline of Psychiatry* (1962), at 309 (psychodiagnostic examination may or may not include a personal interview).

and that Patuxent had "failed to make reasonably diligent efforts" to evaluate Davis despite the availability of data in the institution's files.[35] The court concluded that Patuxent "has displayed such marked indifference to its plain duty in the premises as to amount to a deprivation of Davis' liberty without that due process of law commanded by the Fourteenth Amendment to the Federal Constitution. The State cannot escape the consequences of such impermissible inaction by one of its instrumentalities."[36]

Thus, it is factually inaccurate for the State to assume in all cases and without further explication that an inmate such as McNeil must be personally interrogated before he can be diagnosed. Under such a blanket assumption, non-compliance on McNeil's part can be converted into a simple ploy on behalf of the State to keep him confined. By asserting that his help is essential and that no report can be made without it, the State avoids judicial interference indefinitely and maintains incarceration as if McNeil had

---

[35] The data as to Davis included his criminal record; juvenile court, school, and social worker reports; physical examinations; psychological and psychiatric reports made prior to his confinement at Patuxent; and a personal interview of Davis by Dr. Kelman soon after his confinement.

[36] In *Davis*, the Court of Special Appeals denied the State's petition for writ of certiorari by unreported opinion dated January 8, 1972 (Misc. No. 23, September Term, 1971). While stating that the order "was entered in apparent disregard" of *State v. Musgrove*, 241 Md. 521, 217 A.2d 247 (1966), the appellate court pointed out that it had no statutory jurisdiction to review the lower court's habeas corpus order. Ironically, the statement in *Musgrove* that a personal interview would "usually" be needed for the staff's evaluative report (217A.2d at 251) is also dictum, since the appeal there sought was likewise from a habeas corpus order releasing an inmate after expiration of his criminal sentence, and the institution had relied on the inmate's non-cooperation as an excuse for not timely filing the report required by statute. 217 A.2d at 248-249. The appellate court in *Musgrove* did not expressly address itself to the due process issue raised here.

been adjudged a defective delinquent after a full hearing with evidence, witnesses, confrontation, cross-examination, a jury finding, and all the rest.

Patuxent has simply abandoned McNeil to time, depriving him of any opportunity to return to a productive life in society and squandering the State's resources on his continued confinement. This enforced isolation from the outside world is dramatically illustrated by the ex parte letter (note 14, *supra*) sent by Patuxent to the committing court and to the prosecutor but *not* to the inmate or his attorney.[37] The letter, far from soliciting a court hearing to determine McNeil's status or the legality of his position, merely informed the court of his refusal to be examined and the alleged inability of the institution to come forth with the required report. The letter stated that the court would be further advised if there was any change in McNeil's position. The court did not bother to answer the letter, and of course McNeil was unaware of it.[38]

(b) Other Constitutional Violations.

The State's refusal to do anything—to make an evaluative report, to hold a judicial hearing as to McNeil's status, or to offer him rehabilitative treatment—has been deliberate,

---

[37] It is no excuse that a copy of the letter was placed in McNeil's Patuxent file. In the first place, unless an inmate's attorney happens to be reviewing the file, presumably on some other business, he will never even come across the letter. Secondly, in McNeil's case he has been without an attorney during part of his incarceration, as evidenced by his pro se Petition to this Court.

[38] This was not an isolated incident. In the case of Bradley Avey, one of the Petitioners in *Murel*, the institution wrote a similar letter to the trial court, again with copies to the prosecutor but not to the defense. The only difference was that the court wrote back, saying that it assumed Patuxent would "retain Mr. Avey * * * until he changes his mind in the matter". Murel J.A.4, at 284-285. Parenthetically, Patuxent not only read but made copies of or notes from letters between Avey and his attorney. Murel J.A.4, at 68-69.

not accidental. More than a shocking denial of due process is involved here.

(i) *Equal Protection.*

Patuxent's issuance of an evaluative report on at least one inmate (McKenzie) despite a lack of a personal interview while it refuses to file an evaluative report on McNeil constitutes a gross and cynical violation of equal protection. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). It is both an ironic and a depressing fact that if McNeil had been confined at the Correctional Institution at Hagerstown, to which he was originally ordered for service of his sentence, and he had actually completed his full sentence at that institution, he would have received five years of "courses of academic education from the elementary through high school grades, diversified vocational and on-the-job training activities, individual and group psychotherapy, counselling and guidance." 48 Opin. Atty. Gen. Md. 82, 88 (1963). Yet because he has pleaded the Fifth Amendment, he has received *no* activities, therapy, counselling, or guidance for any of the almost six years he has spent at Patuxent. Even if he is not constitutionally entitled to be treated the same as inmates of the State's prisons, he is certainly entitled to the same evaluative reporting procedure accorded other inmates of Patuxent.

(ii) *Speedy Trial.*

The State's continuing delay of more than six years in holding a judicial hearing as to McNeil's possible defective delinquency also violates the speedy trial guarantee of the Sixth and Fourteenth Amendments. For example, in *Klopfer v. North Carolina,* 386 U.S. 213 (1967), the Court held that indefinite delay in prosecution of a criminal action—where the State had taken "nolle prosequi with leave," discharging the accused from custody but leaving him subject to future prosecution—violated speedy trial

rights under these Amendments. Mr. Justice Harlan, concurring, said that the "traditional concepts of due process" set forth in the Court's opinion also sustained the holding that the accused was entitled to a hearing on the charges against him, whether or not the State wanted to provide it. 386 U.S. at 227. In *People ex rel. Myers v. Briggs*, 46 Ill.2d 281, 263 N.E.2d 109 (1970), an illiterate deaf-mute (Lang) indicted for murder had been confined to a mental institution after a jury had found him incompetent to stand trial. While confined, Lang "refused to participate and cooperate" with instructors at the institution who sought to teach him sign language and other communication skills. The Supreme Court of Illinois held that Lang was entitled to "a reasonable opportunity to obtain the benefit of his constitutional rights" in the face of indefinite commitment, and ordered the state either to hold a hearing on the criminal charges or to release him. 263 N.E.2d at 113.

(iii) Cruel and Unusual Punishment.

The State has imposed indefinite confinement on McNeil as punishment for his refusal to submit to its psychiatric examination and has denied him rehabilitative treatment, all in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. McNeil's continued confinement violates this ban in three respects. First, indefinite confinement for refusal to cooperate with the institution's examination constitutes a prohibited punishment. *Wright v. McMann*, 321 F. Supp. 127, 145-146 (N.D.N.Y. 1970) (solitary for 1½ years for refusal to sign acknowledgment of institution's safety rules). Second, indefinite confinement without affording treatment also violates that constitutional provision. See *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971) (persons involuntarily committed without the due process protections afforded defendants in criminal proceedings "unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her

mental condition"); *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1079 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969) (prolonged custodial commitment may itself "cause serious psychological harm or exacerbate any pre-existing condition"); *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966). Third, confinement solely on the basis of a criminal conviction to an institution housing persons found to be defective delinquents, without a judicial finding that McNeil belongs to the same class, likewise violates the ban. *People ex rel. Cirrone v. Hoffmann*, 255 App. Div. 404, 8 N.Y.S.2d 83, 86 (S.Ct. 1938); see also *United States ex rel. Schuster v. Herold, supra*, 410 F.2d at 1078-1079 ("obvious but terrifying possibility" that inmate may not be mentally ill but is confined, "marooned and forsaken," with persons found to be so).

(iv) *Involuntary Servitude.*

Finally, imprisonment of McNeil at Patuxent beyond the expiration of his criminal sentence violates the Thirteenth Amendment's prohibition against involuntary servitude. *Cf. Wright v. Matthews*, 209 Va. 246, 163 S.E.2d 158 (1968) (prisoner's continued detention after his criminal sentence had expired on the grounds that he had not paid the state for the costs of his criminal prosecution violated the Thirteenth Amendment). See also *United States ex rel. Caminito v. Murphy*, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955) (continued detention in jail after conviction of a crime at a trial at which the prisoner had been denied due process of law under the Fourteenth Amendment violates the Thirteenth Amendment).

It is time to stop this tragic deprivation of an entire series of McNeil's constitutional rights.

II. THE PRIVILEGE AGAINST SELF-INCRIMINATION FORBIDS CONFINING McNEIL INDEFINITELY AT PATUXENT, AS THE PRICE FOR REFUSING TO SUBMIT TO THE INSTITUTION'S PSYCHIATRIC TESTS.

As we have seen, McNeil's reason for refusing to "cooperate" with the commitment process at Patuxent is irrelevant to his right to a hearing. No matter what his reason, he cannot be permanently interred, which is essentially what has happened, without a judicial hearing. In this instance, however, McNeil has had very good reason indeed for declining to "cooperate," which is a euphemism for refusing to incriminate himself at the behest of the officials at Patuxent.

The Fifth Amendment privilege against self-incrimination, applicable to the states through the Due Process Clause of the Fourteenth Amendment, insures the right of a person "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty * * * for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). In *Malloy*, the petitioner had been arrested during a gambling raid by Hartford, Connecticut, police. He pled guilty to "pool selling," a misdemeanor, and was placed on two years' probation after serving 90 days of a one-year jail sentence. During the probation period, Malloy was ordered to testify as a witness before a court-appointed referee who was conducting a wide-ranging statutory inquiry into alleged gambling and other criminal activities in Hartford County. When Malloy appeared before the referee, he refused to answer "a number of questions related to events surrounding his arrest and conviction". 378 U.S. at 3. The penalty imposed for this silence was indefinite imprisonment for contempt of court until Malloy was willing to answer the questions. This Court reversed the decision of the state court which had sustained the penalty, applied the federal standards developed under the Fifth

Amendment, and held that imposition of such a penalty on Malloy (even though he was not a defendant in a criminal prosecution) violated his privilege against self-incrimination.[39]

The privilege outlaws "any compulsory discovery" as "contrary to the principles of a free government" (*Boyd v. United States*, 116 U.S. 616, 631-632 (1886)), wherever it is "evident from the implications of the question, in the setting in which it is asked, that a responsive answer * * * or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman v. United States*, 341 U.S. 479, 486-487 (1951). In cases decided since *Malloy*, this Court has consistently struck down sanctions imposed by state authorities in a variety of settings for refusals to answer questions where the person "has reasonable cause to apprehend danger from a direct answer."[40] *E.g.*, *Spevack v. Klein*, 385 U.S. 511 (1967) (attorney cannot be disbarred because he relied on the privilege during disciplinary proceeding); *Gardner v. Broderick*, 392 U.S. 273 (1968) (policeman cannot be fired for invoking the privilege as grounds for refusing to sign a waiver of immunity at grand jury hearings into alleged bribery and corruption); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968) (sanita-

---

[39] In their joint dissent from the Court's opinion, Justices White and Stewart expressed their preference for "the rule permitting the judge rather than the witness to determine when an answer sought is incriminating". 378 U.S. at 33. Under either the Court's or the dissent's view of the privilege in *Malloy*, McNeil's continued confinement violates his privilege against self-incrimination because there has never been a prior judicial determination as to whether requiring him to answer the specific questions sought to be posed by the State would or would not violate the privilege.

[40] *Hoffman v. United States, supra*, 341 U.S. at 486.

tion workers may not be discharged for invoking the privilege before the city commissioner of investigation).[41]

For the reasons set forth below, we contend that this Court's decisions in *Malloy v. Hogan* and the other cases cited above establish that McNeil's privilege against self-incrimination was impermissibly infringed.

(a) The Questions Asked By The State Focus on the Inmate's Criminal Behavior.

The incriminating nature of the questioning which the State seeks to undertake becomes quickly apparent when that questioning is placed in the context of what has actually occurred to date and what will occur if the questioning is allowed to proceed.

---

[41] In *Garrity v. New Jersey*, 385 U.S. 493 (1967), decided the same day as *Spevack*, police officers had testified in an investigation by the state Attorney General into the fixing of traffic tickets, after the officers had been told that they would be fired if they refused to testify. The state subsequently sought to use some of this testimony in criminal prosecutions of the policemen. This Court held that the Fifth Amendment barred the introduction of such testimony.

In a dissent, Justices Clark, Harlan and Stewart stated: "The central issues here are * * * identical to those presented in *Spevack* * * *: whether consequences may properly be permitted to result to a claimant after his invocation of the constitutional privilege, and if so, whether the consequence in question is permissible. * * * [N]othing in the logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged. The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect." 385 U.S. at 500, 507. Even under this view of the privilege, there could be no greater hazard to its integrity than the confinement of McNeil without a judicial hearing for an indefinite period, possibly life, because he has remained silent. We further submit that there is no urgent public interest, indeed no public interest whatever in confining McNeil indefinitely beyond the expiration of his criminal sentence in the absence of any finding by any court that McNeil should be classified as a "defective delinquent."

To begin with, the defendant does not even become subject to diagnosis—and thus questioning—unless there is reasonable cause to believe that he has already demonstrated both "persistent aggravated anti-social or criminal behavior" and "a propensity toward criminal activity." Article 31B, §5; see Murel J.A. Md. at 166, 259, 348.[42] He must also have been convicted of and sentenced for at least one specific crime. Article 31B, §6(a). We begin, then, with the one person out of the general population who is most likely to incriminate himself.

The nature of the questioning that is to follow is sharply etched, though in capsule form, by the preliminary interview conducted by the Medical Department to determine whether the defendant should even be referred to Patuxent for diagnosis. In McNeil's case, the report that resulted from this interview showed repeated, insistent interrogation about not only the crime for which he had been convicted, but all other anti-social incidents, going back to the tenth grade, that the interrogator could find reflected in available records.[43] (McNeil vehemently denied complicity in all of

---

[42] In this regard, however, it is noteworthy that the trial court conceded, at the time McNeil was referred to the Medical Department for a report: "* * * the Court records do not reflect a conviction on any previous charge * * *." J.A. 32.

[43] *E.g.*, "He adamantly and vehemently denies, despite the police reports, that he was involved in the offense;" "Further questioning revealed that he had stolen some shoes but he insisted that he did not know that they were stolen * * *;" "* * * in the tenth grade he was caught taking some milk and cookies from the cafeteria;" "He consistently denies his guilt in all these offenses;" "He insisted that he was not present at the purse snatching;" "He was adamant in insisting on this version of the offense despite the police report which was in the brief and which I had available and discussed with him;" "He continued his denial into a consideration of a juvenile offense * * *;" "He denies the use of all drugs and narcotics;" "* * * I explained to him that it might be of some help to him if we could understand why he did such a thing but this was to no avail." Report of John C. Sheehan, M.D., dated July 19, 1966, note 2, *supra*.

these incidents—so much so that even his denials were taken as a sign that "further offenses may occur.") To contend in the face of this type of questioning that it produces "physical evidence"[44] as opposed to testimonial self-incrimination would be ridiculous.[45]

Following the report of the court medical officer, the defendant is transferred to Patuxent where, after an initial interview with a classification officer,[46] a lapse of time is allowed for the collection of records, reports, etc. *See* note 30, *supra;* Murel J.A. 4 at 212; Murel J.A. Md. at 269-270, 669. This material, gathered in preparation for the forthcoming in-depth questioning of the inmate, includes all types of police reports, including those from the F.B.I., state and local police, the Armed Services, juvenile authorities and others. Note 30, *supra;* see example at Murel J.A. 4 at 540-541. When this gathering process has been completed, the defendant is brought forward for the group interview. "The law requires [that] at least three people be involved in the staffing [at the diagnostic interrogation], but it does not preclude the possibility of additional people being involved in the staffing procedure. We frequently, in fact always, have more than just the three people who do the examination." Murel J.A. 4 at 271. "[E]very member of the staff who is present at the staff meeting has the opportunity" to interrogate the defendant. *Id.* at 274. The

---

[44] *Compare United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Schmerber v. California*, 384 U.S. 757 (1966).

[45] Moreover, the real point is not what the interrogator intends but what information he can be expected to elicit and what use will be made of that information by the State. *See* Note, *Requiring A Criminal Defendant To Submit To A Government Psychiatric Examination: An Invasion Of The Privilege Against Self-Incrimination*, 83 Harv. L. Rev. 648 (1970).

[46] The Classification Committee includes, in addition to a psychiatrist and psychologist, a social worker, a classification supervisor, an educational supervisor and a correctional officer. Murel J.A. Md. at 842-843.

staff includes social service workers and caseworkers in addition to psychiatrists and psychologists. Murel J.A. Md. at 172, 621-623, 661, 814-840; Murel J.A. 4 at 200-203.

The inmate is *not* warned of his constitutional rights —including his right to remain silent—unless he himself first brings up the subject. Murel J.A. 4 at 241, 243-244. Yet the record in *Murel* is replete with testimony that the questions asked by the staff inevitably focus on the convicted defendant's history of criminal behavior:

——Dr. Arthur Kandel, Chief Psychologist at Patuxent, told the court that "usually the question will be asked of the inmate what offense led to his coming to the institution. Both he and we, of course, are aware that we have written material in this regard, including the statements he may have made about his latest offense to the examining psychiatrist, psychologist, social worker, but he is asked this question again. * * * They [the staff] will ask about what past crimes they had committed * * *. * * * Frequently, they [the inmates] will talk about many crimes [which] appear [nowhere] in the records." Murel J.A. 4 at 203-204. Dr. Kandel was asked: "* * * [D]o you say [to the inmate], well, the F.B.I. reported it this way, do you now still want to stick to your story?," and he answered, "Yes." He explained that many times an inmate "will try to avoid giving his past background of offenses because he may feel that this would not be advantageous to him, and then he would be confronted with the F.B.I. report." *Id.* at 210. He quite candidly and explicitly noted that "there are a series of questions to elicit and to determine the past criminal record, antisocial and criminal behavior of the individual." *Id.* at 236.

——Dr. Manfred S. Guttmacher, Chief Medical Officer of the Supreme Bench in Baltimore, testified that a psychiatrist determines whether a person evidences a "propensity toward criminal activity" under Article 31B, §5, primarily by considering his past criminal behavior. Murel J.A. Md. at 173, 176-177, 181. He gave one example of an inmate who "admitted to me

that he had had sexual relations with at least 200 small boys" although he had only been convicted twice. *Id.* at 222.

—Dr. Philip Q. Roche, Chairman of an American Psychiatric Association Committee which made a report on Patuxent, testified that a psychiatrist seeking to determine whether a defendant had demonstrated "persistent aggravated anti-social" behavior under § 5 would find a "chronic repetitive pattern" of such behavior "very significant." *Id.* at 200. Dr. Karl A. Menninger, Director of the Menninger Foundation, testified that whether a person constituted an "actual danger to society" under § 5 could be established *only* by his past history of dangerous behavior. *Id.* at 282.

—Dr. Harold M. Boslow, Director of Patuxent, testified that the referral examination at Patuxent includes a discussion of the defendant's life history, and that if his answers to questions as to his past seem to conflict with other material in the record, the examiners resolve the conflict by "attempt[ing] to contact the proper authorities." *Id.* at 622-625. Among the items discussed are "his truancy, his anti-social behavior, his conflict with authorities, * * * all the details we can possibly get into." He is asked about his F.B.I. record, and "if he says it never happened, we attempt to investigate it further, you see." *Ibid.* He gave an example of an inmate accused of "accosting a young girl" and how the inmate "vigorous disputed it." *Id.* at 624.[47]

---

[47] Even Judge Sobeloff, who thought in *Tippett v. Maryland*, *supra*, that the questioning was not *intended* to "entangle [the prisoner] in any criminal prosecution" (436 F.2d at 1161 n.6), conceded that:

> The statute directs the staff to make inquiry into the crime for which the prisoner has been sentenced and the circumstances surrounding the crime. The interviews also focus on (Cont'd.)

It is clear from these and other portions of the record in *Murel* that the staff believes that it must personally question the inmate about his prior criminal conduct, and that what the staff finds in the files or records about that conduct is only a starting point for a series of questions seeking more details about recorded incidents of criminal behavior and new information about unrecorded incidents of such behavior.[48]

(b) Answering The State's Questions Can Incriminate The Inmate In Four Respects.

Responding to the questions the staff claims it must ask in order to make its diagnosis of "defective delinquency" can be self-incriminating in at least four different respects:

(i) Answers to questions concerning the crime the conviction of which immediately preceded referral to Patuxent can be self-incriminating if the direct appeal from the conviction proves successful, and a new trial on the same charges is held. The introduction at re-trial of evidence derived from statements made to the examiners[49] could

---

other crimes and antisocial behavior in his past. There is no contention by the state that the disclosures are voluntary. * * * Admissions made concerning mental state and past criminal behavior provide significant evidence for the state to use at the judicial hearing on defective delinquency. [*Id.* at 1160-61; footnote deleted.]

[48] Moreover, as noted above, the statute itself requires that the Institution obtain not only a complete statement as to the crime for which the inmate was convicted but "the circumstances of such crime." Article 31B, Section 7(a). Although the inmate is questioned about his criminal conduct, he is not shown what the staff has in its possession relating to that conduct or its recommendation in regard to him. Murel J.A. 4; at 202-203, 211, 228, 238.

[49] The state prosecutors would not be limited to learning about such statements at a defective delinquency hearing at which the examining doctors testify (Article 31B, § 8). Partial disclosures of

(Cont'd.)

lead to conviction. In the present case, McNeil's defense at trial, based on his own testimony, was that he did not commit the offenses charged, and to require him to discuss the circumstances of the offenses while his appeal was pending would clearly violate the privilege against self-incrimination.

(ii) Answers to questions about the crime which triggered referral to Patuxent can be self-incriminating with respect to collateral challenges to the conviction. In this case, for example, McNeil's first petition for post-conviction relief claimed, *inter alia*, that his arrest had been made without probable cause. If at the hearing on this claim, the State introduced evidence about that conduct based on or derived from statements McNeil made to the staff at Patuxent, such a claim could also be vitiated. Various post-conviction proceedings have been pending during virtually all of the time McNeil has remained at Patuxent.

(iii) Answers to any questions about criminal or other anti-social behavior can be self-incriminating because they may reveal for the first time evidence of a crime or "a link in the chain of evidence"[50] of a crime about which state

---

criminal or other anti-social conduct, which in the opinion of the Patuxent staff might be too fragmentary upon which to base an opinion one way or the other on the question of defective delinquency, would nevertheless be noted in the inmate's official file at Patuxent, and state prosecutorial authorities have access to this file. *Compare United States v. Freed*, 401 U.S. 601, 606 (1971), relied upon by the state at pages 86-87 of its brief in *Murel*, where this Court held that the privilege against self-incrimination was not violated because registration data compiled under the provisions of the National Firearms Act was not, as a matter of administration, made available to prosecutorial authorities. Here the self-incriminating statements *are* available to such authorities both from the testimony at the defective delinquency hearing *and* from the inmate's official file at Patuxent.

[50] In *Malloy v. Hogan*, *supra*, 378 U.S. at 13, the Court stated:

> It was apparent that petitioner might apprehend that if this person [about whom he was asked] were still engaged in

(Cont'd.)

authorities had no prior knowledge or insufficient knowledge to prosecute. In this regard, it is important to note that in Maryland, *there is no statute of limitations as to any crime for which the punishment is imprisonment.* This means that McNeil and every other inmate at Patuxent can still be punished for all but the most negligible crimes that they may have committed *at any time in their lives.*

With respect to each of these three dangers of self-incrimination, there is at present no "immunity" stemming from state law prohibiting prosecutorial authorities from using evidence obtained during the examination at Patuxent for further prosecution of the defendant. In his separate opinion in *Tippett v. Maryland, supra,* Judge Sobeloff said he would "insist" that "the prisoner is entitled to complete immunity in respect to matters he is compelled to disclose." 436 F.2d at 1161 n. 6. However, despite Judge Sobeloff's "insistence," there is no such immunity under state law now, and neither Judge Sobeloff nor the *Tippett* majority actually ruled that a Patuxent inmate is entitled to such immunity as a matter of federal constitutional law.

Compelling answers to all questions, but then granting the prisoner immunity from their use against him, would not be the appropriate remedy anyway. In *Murphy v. Waterfront Comm'n,* 378 U.S. 52 (1964), this Court approved the granting of immunity as a means of protecting the privilege in the context of an investigation by the Waterfront Commission of New York Harbor into a work stoppage at the Hoboken, New Jersey, piers so long as the "grant of immunity * * * is coextensive with the scope of the privilege against self-incrimination * * *." *Id.* at 54. This approach would be totally inappropriate in the case of the questions asked at the Patuxent psychiatric examinations because it simply would not provide sufficient

---

unlawful activity, disclosure of his name might furnish a link in a chain of evidence sufficient to connect the petitioner with a more recent crime for which he might still be prosecuted. [Footnote deleted.]

safeguards to the Patuxent inmate. Even if he was granted immunity from the use of his answers at the defective delinquency judicial hearing as well as at prosecutions for other crimes (or re-prosecutions for the crime leading to referral), the testifying doctor could not be asked to "bifurcate his mind" and pretend that his expert opinion on the status of the subject as a defective delinquent was based solely on evidence other than the subject's immunized answers to the self-incriminating questions. In addition, as the court pointed out in *Shepard v. Bowe*, 250 Ore. 288, 442 P.2d 238 (1968), the dangers of misuse of the answers by prosecutorial authorities, even under immunity, are still too great:

> Even if we prohibited the psychiatrist from testifying to incriminating statements made to him by the defendant in a pre-trial mental examination, requiring the defendant to answer could nevertheless jeopardize the privilege against self-incrimination. The statements made by the defendant to the psychiatrist could provide a lead to other evidence which would incriminate the defendant on the issue of guilt. If the trial court ordered that statements made by the defendant to the psychiatrist could not be revealed to the state or to any other person except upon court order, we are of the opinion that under certain circumstances there is more than a remote chance that such statements would become known to others in addition to the trial court. [442 P.2d at 241.]

Forcing a prisoner to speak to a psychiatrist by granting immunity would also be self-defeating. As one psychiatrist—a former superintendent of state mental hospitals in both Maryland and Iowa—put it in the *Murel* case: "Well, ultimately, if there is going to be constructive change brought about, there must ultimately be a relationship of mutual trust and respect. * * *." Murel J.A. Md. at 67, 84; see also 85-87, 136, 138. It is hard to imagine a practice that would destroy mutual trust and respect more thoroughly than forcing a prisoner to talk to a psychiatrist

against his will and under threat of a contempt order. Since one of the purposes of incarceration at Patuxent is therapy designed to equip the prisoner for return to civilian life, the net effect of immunity would be to facilitate an initial evaluation but in the process to reduce drastically the hope of rehabilitation.

(iv) Moreover, even if such immunity were granted, it would have no effect whatever on the fourth respect in which statements made to the Patuxent staff may be self-incriminating: they may be used against the examined person in ordering him confined indefinitely—even beyond the period of the criminal sentence—as a defective delinquent. The reports of the staff at Patuxent are admissible in evidence at the judicial hearing on defective delinquency (*e.g., Schlatter v. Director,* 238 Md. 132, 207 A.2d 653 (1965)), even if the persons preparing the reports do not testify. *E.g., Mastromarino v. Director,* 243 Md. 704, 221 A.2d 910 (1966). Evidence of a person's past history of anti-social or criminal behavior is admissible at the hearing (*e.g., Sas v. Maryland,* 334 F.2d 506 (4th Cir. 1964); *Daniels v. Director,* 238 Md. 80, 206 A.2d 726 (1965)), and testimony can be given as to the nature of past offenses, not merely the fact of conviction. *Schultz v. Director,* 227 Md. 666, 668, 177 A.2d 848, 849 (1962). In *Simmons v. Director,* 227 Md. 661, 177 A.2d 409 (1962), the court held that a psychiatrist's testimony as to prior offenses and convictions of the inmate, which information was obtained by the psychiatrist's questioning of the inmate, was admissible.

There is no protection in Maryland against these various forms of self-incrimination. In 1966, the Maryland legislature passed a statute establishing, under certain specified circumstances, a privilege pursuant to which a patient may prevent a psychiatrist or a psychologist from disclosing "in civil and criminal cases" any communications made to him by the patient for purposes of diagnosis and treatment. Md. Code Ann., Art. 35, §13A. However, the statute expressly

excepts from the privilege disclosures made to such doctors in "all phases of any civil or criminal proceedings" under the defective delinquency statute. Article 35, §13A(c)(5). Although Article 35, §13A, would appear to prohibit Patuxent doctors from testifying with respect to disclosures made to them by a person referred to Patuxent in a subsequent criminal prosecution of that person, it is unclear under Maryland case law whether this is in fact the case. *See Avey v. State*, 9 Md. App. 227, 263 A.2d 609, 614 (1970) (since *defendant* failed to prove that the State's Attorney obtained evidence leading to conviction as a result of examining defendant's records at the Department of Mental Hygiene, court would not decide whether the privilege provided by Article 35, §13A, had been violated); see also Murel J.A. Md. at 252-253.

Moreover, even on its face the statute does not provide any privilege for disclosures made to any member of the staff *other than* a psychiatrist or psychologist—such as a social worker, caseworker or classification officer—about the details of crimes, nor does it prevent such disclosures to anyone—be it psychiatrist, psychologist, or anyone else—from being used by prosecutorial authorities as a "link in a chain of evidence" to convict a person for other crimes or to reprosecute him for the crime which triggered the referral to Patuxent.[51]

---

[51] In a larger context, this Court should note in deciding this case that many states do not have statutes protecting communications between patients and psychiatrists or psychologists, and that others have statutes which are limited by numerous exceptions and qualifications. *See generally* 8 Wigmore, Evidence §§ 2380-2391 (McNaughton revision 1961). Accordingly, both in Maryland and in many other states, any "doctor-patient privilege" which may exist is not "coextensive with the scope of the privilege against self-incrimination." *Murphy v. Waterfront Comm'n, supra*, 378 U.S. at 54; *Counselman v. Hitchcock*, 142 U.S. 547 (1892). Thus, only the constitutional protection against self-incrimination provided by the Fifth Amendment is a sufficient safeguard to protect the person being questioned about his crimes by the Patuxent staff.

Despite the many dangers of self-incrimination inherent in the Patuxent examinations, the District Court in *Sas v. Maryland, supra,* rejected the argument that the Maryland defective delinquency statute abridged the "right to remain silent" on the ground that "no resort to punitive measures occurs when a person referred for examination refuses to answer questions or to submit to an examination." 295 F. Supp. at 410. This is, of course, preposterous, since the refusal to answer these incriminating questions does, in fact, result in the imposition of a series of severe sanctions:

(i) Regardless of how much information the staff has in its possession about the inmate, and no matter how many non-incriminatory tests he may have undergone (see Section I(a), *supra*), the staff refuses to diagnose him (Murel J.A. 4 at 223), with the result that he never receives a hearing and must remain indefinitely-incarcerated at Patuxent.

(ii) He also remains on the receiving tier indefinitely, which means that he receives no treatment. *Id.* at 281-282. We thus have a literal example of what one psychiatrist hypothesized as a "tragedy":

> What I think would be a tragic thing is to put people in a place where they are not getting enough help to maximize their potential, and put them in there for an indeterminate period. If that would occur, I think that would be a tragedy. [Murel J.A. Md. at 353.]

(iii) In the normal case, a defendant's criminal sentence is suspended after his commitment to Patuxent "and the defendant shall no longer be confined for any portion of said original sentence * * *." Art. 31B, §9(b). Since McNeil has never been committed, his sentence continued to run until it expired. Although the statute clearly contemplates that there will be court review prior to the expiration of a sentence,[52] none has taken—or will take—place, and McNeil

---

[52] Article 31B, §7(a), requires the staff to submit its written diagnosis to the court at least "3 months before expiration of [the inmate's] sentence * * *."

simply remains confined indefinitely.[53] Nor is this unique to him. At the time of the Director's testimony in the *Daniels* case, 20% of the Patuxent inmates were serving beyond their expired sentences. Murel J.A. Md. at 645, 858. Even more dramatically, of the 135 inmates paroled from Patuxent from its opening in 1955 until September, 1965, 46% had served beyond their expired sentences. *Id.* at 892-895.[54]

In addition to its seriously mistaken conclusions about the imposition of punishment on those Patuxent inmates who, like McNeil, decline to answer incriminating questions by the staff, the District Court in *Sas* also held that the privilege against self-incrimination was not available at the Patuxent examinations because the purpose of the examinations was not to determine whether the defendant had committed a crime, but was to discover his "mental and emotional condition." 295 F. Supp. at 411. Even if this were true (which we do not concede), it is well settled that the consequences of self-incrimination, not the purpose of the questioner, determines whether the privilege is available.[55]

---

[53] As the State told the Court in its opposition to McNeil's Petition for a Writ of Certiorari, "Judge Thomas further found that a person referred to Patuxent * * * for the purpose of determining whether or not he is a defective delinquent may be detained in Patuxent until the procedures for such determination have been completed regardless of whether or not the criminal sentence has expired." Brief in Opposition, p. 3.

[54] Still another sanction is that unless the inmate periodically returns to a staff member and personally informs him that the inmate still refuses to answer questions, the inmate is disciplined. Murel J.A. 4 at 121, 217-221, 244, 322-323.

[55] *See* note 45, *supra*. *See also State ex rel. North v. Kirtley*, 327 S.W.2d 166 (Mo. 1959) (construing the self-incrimination provision of the Missouri Constitution, which was substantially similar to that in the Fifth Amendment to apply even though the purpose of the questioning was to make the defendant civilly liable); *State v. District*

(Cont'd.)

Moreover, as applied to the Patuxent examination, the District Court's conclusion about purpose is inconsistent with decisions by the Fourth Circuit and the Maryland state courts.[56] These decisions indicate that one of the purposes of the defective delinquency provisions is protection of society from those who are disposed to commit crimes. Indeed, *The Report Of Commission To Study and Re-Evaluate Patuxent Institution* 11 (1961), which was commissioned by the Legislative Council of the Maryland General Assembly, found that the purpose of confining "dangerous criminals" was "the core of the project."[57]

Court, 426 P.2d 431, 438 (Wyo. 1967). *See also California v. Byers*, 402 U.S. 424, 451-452 n. 6 (1971) (privilege was "presumably available in the ordinary civil lawsuit context") (concurring opinion of Mr. Justice Harlan); *cf. In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967).

[56] In *Sas v. Maryland*, *supra*, 334 F.2d at 513, the Fourth Circuit found it "obvious" that at least the *primary* purpose of the defective delinquency law is not to provide treatment for delinquents. This seems clear, since the Maryland courts have held that a person can be confined as a defective delinquent even if he is not treatable. *Barnes v. Director*, 240 Md. 32, 212 A.2d 465 (1965).

[57] Since McNeil has been involuntarily deprived of his liberty, it does not matter whether Patuxent is denominated a rehabilitation center or penal institution, a hospital or prison, a psychiatric institution or penitentiary. It does help to focus on the realities, however, to note that Patuxent has virtually all of the attributes of a prison. The guards are not specifically trained and have no special qualifications. Tiers are closed off by steel doors. In addition, each cell is sealed by two separate doors—one "a steel grill work door that is always closed except when someone is going in or coming out" and the other a metal, solid door with a window. These cells are nine by six feet in size and have only a bunk, commode, wash basin, table and under drawer table for the bunk. Inmates can shower once a week. Those who engage in infractions are placed in "the hole;" it has only a bunk. Armed guards watch from towers inside a barbed wire fence surrounding the grounds. Murel J.A. Md. at 92-93, 256-257, 356, 517, 524, 536, 744-745; Murel J.A. 4 at 102-106, 319, 367-371. One psychiatrist was asked, "In the tours that you have had, can you tell us, does Patuxent strike you as a hospital." His

(Cont'd.)

In affirming the lower court's legal conclusion that the Fifth Amendment privilege against self-incrimination did not apply at the Patuxent examinations, the Fourth Circuit in *Tippett v. Maryland, supra,* leaned on its classification of Article 31B as a "civil" statute, and therefore held that the existing procedural safeguards were adequate. The court's statement that "although criminal conduct is necessarily bound up in every case, the inquiry does not focus on particular criminal acts but on the mental and emotional condition of the person" (436 F.2d at 1197) is simply incorrect. As discussed above, past criminal behavior by the inmate—indeed at least one criminal *conviction*—is essential to a finding of defective delinquency. Thus, one could hardly imagine a statute which focuses more directly on a "highly selective group inherently suspect of criminal activities." *Albertson v. SACB,* 382 U.S. 70, 79 (1965).[58]

---

reply was: "It looks like a prison, to me." Murel J.A. Md. at 91; see also *id.* at 93, 109-110. Another said that Patuxent "actually, I believe, has far more locked doors and grill gates than this maximum security prison of the Navy." *Id.* at 132.

[58]In *Albertson,* a federal statute required members of organizations which the Subversive Activities Control Board had classified as "Communist-action organizations" to state in answer to a question on a printed form whether they were members of the Communist Party of the United States. This Court held that any member of the "highly selective group" at which this statute was directed was entitled not to answer this and other questions on self-incrimination grounds because members of the group were "inherently suspect of criminal activities."

At pages 86-87 of its brief in *Murel,* the State relies on *California v. Byers, supra,* to support its contention that the Fifth Amendment privilege against self-incrimination does not apply to the Patuxent examinations. The facts in *Byers,* which involved a California statute requiring automobile drivers in accidents causing property damage to stop and furnish their names and addresses, bear no resemblance to those here. The plurality opinion in *Byers,* applying the standards set down in *Albertson v. SACB, supra,* held that this California statute is "directed at * * * all persons who drive automobiles in California" and is therefore a neutral "regulatory" statute. 402 U.S. at 429-431. Hence, the privilege did not apply to protect a hit-and-run driver

(Cont'd.)

(c) Labeling The Statute "Civil" Does Not Dissipate The Dangers Of Self-Incrimination.

Constitutional safeguards do not turn on labels.[59] *In re Gault, supra.* In that case, the statute established what was labeled a "civil" proceeding to determine whether particular juveniles were "delinquents." This Court explicitly rejected the argument that the "civil" adjective selected by the state to describe the proceeding made the Fifth Amendment privilege inapplicable:

> [J]uvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. * * * For this purpose at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil". [387 U.S. at 49-50.]

The analytical approach required by *Gault* produces the same conclusion with regard to confinement at Patuxent. Article 31B establishes a procedure for determining whether a person should be confined as a "defective delinquent." The basis for making that determination is not only conviction of a crime but the additional finding that he is "an actual danger to society." This additional finding, not an element of the crime for which McNeil was convicted and sentenced, leads to indefinite incarceration. And it is the

---

from prosecution for violating the statute. The defective delinquency statute at issue here, far from being "neutral" or "regulatory" as was the statute in *Byers*, is even more pointedly aimed at criminals and suspected criminals than was the statute in *Albertson*.

[59] While purporting to agree that labels are not determinative, the Fourth Circuit in *Tippett v. Maryland, supra*, 436 F.2d at 1156-1157, simply blinded itself to the overwhelming evidence in the record of the dangers of self-incrimination discussed above in the text.

evidence for this finding that the State here seeks to compel McNeil to provide from his own mouth.[60]

Even if one must determine that the Patuxent statutory procedure is "criminal" in order for the privilege against self-incrimination to be available, the foregoing discussion overwhelmingly supports the conclusion that the Patuxent procedure is criminal. In *Haskett v. State*, 263 N.E.2d 529 (Ind. 1970), a sexual psychopath law very similar to Maryland's "defective delinquency" law was held "criminal" on the grounds that (1) the act purported to define a "criminal sexual psychopathic person," (2) it applied to those with "criminal propensities," (3) it could be invoked only against persons charged with or convicted of a crime, (4) jurisdiction of proceedings under the act was in the criminal courts, (5) appeals were in the manner prescribed for criminal cases, and, (6) most important, a person determined to be a criminal sexual psychopath could be incarcerated in a mental institution for an indefinite period. On this basis, the *Haskett* court held that the Fifth Amendment privilege against self-incrimination applied to entitle a suspected sexual psychopath to refuse to answer questions at a psychiatric interview conducted to determine whether or not he was a sexual psychopath. Other than the Indiana statute's description of its subjects as "*criminal* sexual psychopaths," each factor applied by the *Haskett*

---

[60] In his opinion for the Court in *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971), Mr. Justice Blackmun described as "wooden" the approach of classifying statutes as "criminal" or "civil" in order to determine whether traditional criminal safeguards do or do not apply. Neither the analysis in *McKeiver* nor that in *California v. Byers, supra*, supports any contention that the applicability of a particular constitutional safeguard to a particular type of state proceeding should turn on the adjective selected by the state legislature or the state courts to describe the purpose of the statute. Instead, the proper approach under the standards laid down by this Court is carefully to analyze the evident dangers of self-incrimination flowing from compliance with the statute as administered by state authorities.

court is present here, and even this single distinction evaporates when one considers that conviction of a crime is a prerequisite to referral to Patuxent.

Furthermore, applying the privilege against self-incrimination at Patuxent referral examinations finds support in the developing weight of authority in the lower courts holding that the privilege applies at pre-trial psychiatric examinations.[61] The pre-trial and Patuxent examinations are generally similar with respect to the type of questions asked and the dangers of self-incrimination inherent in answering them. For example, at both the pre-trial and the Patuxent examinations:

- "There can be little doubt that in answering a psychiatrist's questions a defendant would be making an oral communication involving 'his consciousness of the facts and the operations of his mind'," and that therefore such a communication would be of the testimonial character protected by the privilege. *Commonwealth v. Pomponi, supra,* 284 A.2d at 710.
- "It is apparent that the defendant's answers to the psychiatrist's questions [concerning his conduct relating to the offense charged] might be incriminating upon any of the issues in trial, including the issue whether the defendant committed the act charged." *Shepard v. Bowe, supra,* 442 P.2d at 239.
- If the subject does not wish to raise any question about his mental competency, an "order compelling him to submit to examination, including

---

[61] *E.g., French v. District Court,* 153 Colo. 10, 384 P.2d 268 (1963); *State v. Olson,* 274 Minn. 225, 143 N.W.2d 69 (1966); *State v. Obstein,* 52 N.J. 516, 247 A.2d 5 (1968); *Lee v. County Court,* 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452, *cert. denied,* 404 U.S. 823 (1971); *Shepard v. Bowe, supra; Commonwealth v. Pomponi,* 284 A.2d 708 (Pa. 1971). *Contra: United States v. Albright,* 388 F.2d 719 (4th Cir. 1968), relied upon at page 87 of the State's brief in *Murel.*

> discussion of the alleged criminal event if the examiner believes such questioning is necessary, violates his Fifth Amendment protection against self-incrimination." *State v. Obstein, supra,* 247 A.2d at 11.

Since there are substantial dangers of self-incrimination at the Patuxent examinations—including indefinite incarceration—even though the trial of the referred person has already ended in his conviction, the reasoning of the "pre-trial" cases discussed above applies with equal force here.

III. THE APPROPRIATE REMEDY

Although, as we have shown, the Patuxent staff has available to it a tremendous amount of material on each inmate and in at least one other case has rendered a report without the benefit of personal interrogations, we do not claim that this can be done in every case. We have cited these no-report cases to demonstrate the denial of equal protection and to show that Patuxent's inflexible position has been unreasonable and without factual foundation. We do not mean to imply that a finding of defective delinquency can automatically be made *in every case* without a personal interrogation. Each case would depend on what the record revealed as to that particular inmate. More particularly, we do not waive the right to attack a finding of defective delinquency as to McNeil, should one ever be made, either because his record fails to show defective delinquency or because his record affirmatively shows he is *not* a defective delinquent.

The point, however, is that if Patuxent cannot demonstrate defective delinquency without a personal interrogation, the appropriate remedy is not to deny a hearing or force the inmate to talk. "The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime."[62]

---

[62] *United States v. White,* 322 U.S. 694, 698 (1944), quoted with approval in *Hoffman v. United States, supra,* 341 U.S. at 490.

"Psychiatrists have expressed the opinion that it is difficult at least in some cases, to arrive at a competent opinion on the mental state of the defendant if the defendant cannot be questioned about the alleged crime. * * * We are of the opinion that this is a price that must be paid to enforce the constitutional protection."[63] "These are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."[64]

In this case, the staff has had almost six years to render a report—long past the statutory period for doing so and long past the expiration of McNeil's sentence. The State has kept this man incarcerated all of this time in prison-like surroundings without benefit of therapy or other help. To allow the State still more time at this late date to attempt to correct the situation would be to inflict on McNeil even a more grievous punishment than he has already endured. It is not primarily a question of fault on the part of the institution—although we strongly believe that Patuxent has acted improperly and without constitutional basis; the fact is that McNeil has simply served his time. Other than his original crime, for which he has already paid the price, he cannot be blamed for any part of what has occurred unless he is to be blamed for claiming his constitutional rights.

---

[63] *Shepard v. Bowe, supra,* 442 P.2d at 241.

[64] *Garrity v. New Jersey, supra,* 385 U.S. at 500.

That being the case, we respectfully submit that the only appropriate remedy is to order McNeil promptly released from custody. That was the course followed in *Davis v. Director, supra,* and it is even more appropriate here.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue
Washington, D.C. 20006

Attorney for Petitioner
Appointed by this Court

Of Counsel:

PETER F. ROUSSELOT
RICHARD B. RUGE
Hogan & Hartson
815 Connecticut Avenue
Washington, D.C. 20006

EXHIBIT A

LIST OF DATES ON WHICH EDWARD LEE McNEIL DECLINED TO ANSWER QUESTIONS ASKED BY PATUXENT DOCTORS BASED ON REVIEW OF PATUXENT FILES CONDUCTED ON 3/9/72

(McNeil was transferred to Patuxent on 8/10/66)

	Date	Name of Psychiatrist, Psychologist, or Guard Who Reported That McNeil Declined to Answer	McNeil File Source (File No. D-1885)
1.	10/8/66	Mr. Florenzo	Fm 220-1265 (pink form)
2.	10/11/66	Officer Cullen	Progress Sheet
3.	10/29/66	Dr. Cantrell	Fm 220-1265 (pink form) and Progress Sheet
4.	11/6/68	Dr. Meiller	Fm 220-1265 (pink form) and Progress Sheet
5.	7/25/69	Dr. Meiller	Fm 220-1265 (pink form) and Progress Sheet
6.	6/9/70	Dr. Klark	Fm 166-365 (psychiatric progress notes)
7.	6/19/70	Mr. Florenzo	Fm 220-1265 (pink form) and Progress Sheet
8.	8/10/70	Dr. Klark	Progress Sheet
9.	8/19/70	Dr. Klark	Fm 220-1265 (pink form) and Fm 166-365 (psychiatric progress notes)
10.	10/22/70	Dr. Klark	Fm 220-1265 (pink form), Fm 166-365 (psychiatric progress notes), and Progress Sheet
11.	3/2/71	Dr. Klark	Fm 220-1265 (pink form) and Progress Sheet
12.	9/30/71	Dr. Tasony	Fm 220-1265 (pink form) and Progress Sheet
13.	10/4/71	Mr. Florenzo	Fm 220-1265 (pink form) and Progress Sheet
14.	2/10/72	Dr. Tasony	Fm 220-1265 (pink form) and Progress Sheet
15.	2/14/72	Mr. Florenzo	Fm 108 (psychological report)